OFFICE COPY

TRANSCRIPT OF RECORD

Supreme Court of the United States

OCTOBER TERM, 1963

No. 294

CATHERINE CLINTON, PETITIONER,

vs.

VIRGINIA.

ON WRIT OF CERTIORARI TO THE SUPREME COURT OF APPEALS OF VIRGINIA

PETITION FOR CERTIORARI FILED JULY 19, 1963
CERTIORARI GRANTED DECEMBER 9, 1963

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1963

No. 294

CATHERINE CLINTON, PETITIONER,

vs.

VIRGINIA.

ON WRIT OF CERTIORARI TO THE SUPREME COURT OF APPEALS OF VIRGINIA

INDEX

	Original	Print
Proceedings in the Supreme Court of Appeals of Virginia		
Order granting writ of error and supersedeas	1	1
Proceedings before the Justice of the Peace		
Warrant for felony	2	1
Proceedings before the Police Court of the City of Norfolk		
Order sending warrant to grand jury	2	2
Record from the Corporation Court of the City of Norfolk	3	3
Indictment	3	3
Minute entry of trial and disagreement of jury	4	4
Minute entry of trial	7	5
Notice of appeal and assignment of error	8	6
Excerpts from transcript of testimony	9	7
Testimony of Mrs. Emily Porter—		
direct	9	7
S. N. Edwards—		
direct	11	9

RECORD PRESS, PRINTERS, NEW YORK, N. Y., FEBRUARY 5, 1964

	Original	Print
Record from the Corporation Court of the City of Norfolk—Continued		
Excerpts from transcript of testimony—Continued		
Testimony of Mrs. Catherine Taylor—		
direct	16	9
cross	24	18
Helen Buckridge—		
direct	28	22
cross	33	27
Officer Earl H. Beach—		
direct	34	28
cross	42	37
Motion to strike evidence and rulings thereon	49	39
Further proceedings in the Supreme Court of Appeals of Virginia		
Opinion, Snead, J.	54	40
Judgment	68	49
Clerk's certificate (omitted in printing)	70	49
Order allowing certiorari	71	50

[fol. 1]

IN THE SUPREME COURT OF APPEALS OF VIRGINIA AT RICHMOND

Record No. 5558

CATHERINE CLINTON, Plaintiff in Error,

against

COMMONWEALTH OF VIRGINIA, Defendant in Error.

From the Corporation Court of the City of Norfolk
H. Lawrence Bullock, Judge

ORDER GRANTING WRIT OF ERROR AND SUPERSEDEAS —October 3, 1962

Upon the petition of Catherine Clinton a writ of error and *supersedeas* is awarded her to a judgment rendered by the Corporation Court of the City of Norfolk on the 22nd day of March, 1962, in a prosecution by the Commonwealth against the said petitioner for a felony; but said *supersedeas,* however, is not to operate to discharge the petitioner from custody, if in custody, or to release her bond if out on bail.

[fol. 2]

WARRANT FOR FELONY—November 10, 1961

Commonwealth of Virginia,
City of Norfolk, to-wit:

To any of the Police Officers of the City of Norfolk:

Whereas, C. D. Grant, Police Captain No. Division of Police hereinafter called complainant, of the City of Norfolk, has this day made complaint and information on oath, before me, Leroy T. Cheshire, a Justice of the Peace of said

City, that between October 11th, 1961 and October 25, 1961, in said City Catherine Clinton hereinafter called accused, did unlawfully and feloniously violate section 18.1-208 State Code (Pandering) Place of occurrence: 9630 First View Street. Apt. 103 and other places and whereas I see good reason to believe that an offense has been committed:

These are, therefore, in the name of the Commonwealth of Virginia, to command you forthwith to apprehend and take before the Police Judge of said City in the Municipal Court, Part One, thereof the body of the said accused to answer said complaint, and be further dealt with according to law;

And moreover, upon the arrest of the said accused, by virtue of this warrant, I command you in the name of the Commonwealth of Virginia, to summon to appear at the same time and place to testify as witnesses on behalf of the Commonwealth touching the matter of said complaint, the above named complaint and the following persons:

and have there and then this warrant with your return thereon.

Given under my hand and seal this 10th day of November, 1961.

Leroy T. Cheshire (Seal)
Justice of the Peace.

ORDER OF POLICE JUDGE SENDING WARRANT TO GRAND JURY —November 10, 1961

Upon hearing the evidence on the foregoing charge, the above mentioned accused is sent on to the Corporation Court of the City of Norfolk . . . , to the next term thereof, to-wit: the first Monday in December, 1961, to answer any indictment found against him and the witnesses above named [fol. 3] were severally duly recognized each in the sum of One Hundred Dollars payable to the Commonwealth of Virginia, for their appearance before the Grand Jury of said Court to give evidence of said charge, and not to depart hence without leave of Court.

Given under my hand this 10th day of November, 1961.

Llewellyn S. Richardson, Police Judge.

(on back)

Executed by arresting the within named accused this 10th day of November, 1961.

C. D. Grant, Police Officer.
E. M. Pugh, Police Officer.
N. B. Rogerson, Police Officer.

Complainant Was Notified.

* * * * * * *

IN THE CORPORATION COURT OF THE CITY OF NORFOLK

INDICTMENT

The Grand Jurors of the Commonwealth of Virginia in and for the body of the City of Norfolk, and now attending the said Court, at its December term, 1961, upon their oaths, present that Catherine Clinton, alias Katherine Clinton to-wit on the 25th day of October in the year 1961, and other days within two weeks next prior thereto, in the said City of Norfolk feloniously did knowingly receive money from the earnings of one Katherine R. Taylor, a female, then and there engaged in prostitution, the said money so received as aforesaid not being for a consideration deemed good or valuable in law, in violation of Title 18.1-208 of the Code of Virginia of 1950, as amended, in [fol. 4] such cases made and provided, against the peace and dignity of the Commonwealth of Virginia.

Second Count: And the Grand Jurors aforesaid, upon their oaths aforesaid, do further present that the said Catherine Clinton, alias Katherine Clinton, on, to-wit, the 25th day of October, 1961, and other days within two weeks next prior thereto, in the said City of Norfolk, did unlawfully and feloniously place a certain female, to-wit, Katherine R. Taylor, in a house of prostitution with the intent that she, the said Katherine R. Taylor, should live a life of prostitution in violation of Title 18.1-205 of the Code of Virginia of 1950, as amended, in such cases made and pro-

vided, against the peace and dignity of the Commonwealth of Virginia

(on back)

Indictment for Pandering.

A true bill.

....., Foreman.

3-22-62.

We the jury find the defendant guilty as charged and fix her punishment at 5 years imprisonment and a fine of $500.00.

James L. Rowe, Foreman.

* * * * * * * *

IN THE CORPORATION COURT OF THE CITY OF NORFOLK

MINUTE ENTRY OF TRIAL AND DISAGREEMENT OF JURY—February 26, 1962

Catherine Clinton, alias Katherine Clinton, who stands indicted for Pandering, this day appeared in Court pursuant to the terms of her recognizance, and came as well the Attorney for the Commonwealth and the Attorney for the defendant, said Attorney being of her own choosing, and upon being arraigned plead not guilty to the said indictment, and thereupon came twenty lawful persons, free from exceptions, having been obtained from the *Venire Facias* duly directed and issued in accordance with the statute in such cases made and provided and summoned [fol. 5] by the Sergeant of the City of Norfolk, from which panel the Commonwealth and the defendant each alternately struck four, leaving the following jury, to-wit: David W. Agnew, Howard C. Aldrich, Roland Bott, Nelson E. Duffey, Joe K. Eaton, Haralson Gordon, Leo Laub, Thomas R. Mackey, America Marolla, Peter Mathews, Dorsey W. Mead and Edward N. Sizemore, Jr., who were sworn the truth of and upon the premises to speak, and having fully heard the evidence and argument of counsel, retired to their Chamber, and after some time returned into Court and stated that they were unable to agree upon a verdict, whereupon Roland Bott, one of the jurors, was

withdrawn and the remaining jurors were discharged from further consideration of this case. And this cause is continued and the prisoner permitted to depart pursuant to the terms of her recognizance.

* * * * * * *

[fol. 7]

IN THE CORPORATION COURT OF THE CITY OF NORFOLK

MINUTE ENTRY OF TRIAL—March 22, 1962

Catherine Clinton, alias Katherine Clinton, who stands indicted for Pandering, this day again appeared in Court pursuant to the terms of her recognizance, and came as well the Attorney for the Commonwealth and the Attorney for the defendant, and the defendant having been heretofore arraigned and her plea of not guilty entered of record, thereupon came twenty lawful persons, free from exceptions, having been obtained from the *Venire Facias* duly directed and issued in accordance with the statute in such cases made and provided and summoned by the Sergeant of the City of Norfolk, from which panel the Commonwealth and the defendant each alternately struck four, leaving the following jury, to-wit: Julius Barker, Marshall J. Beasley, Gregory M. Bell, John J. Dozier, Larent G. Halstead, John R. Respass, D. Hill Hollomon, Jr., John H. Rouse, W. Frederick McNeer, Walker C. Newton, Edward T. Rush and James L. Rowe, who were sworn the truth of and upon the premises to speak, and having heard all of the evidence and argument of counsel, returned a verdict in the following words, "We the jury find the defendant guilty as charged and fix her punishment at 5 years imprisonment and a fine of $500.00." Thereupon the defendant, by counsel, moved the Court to set aside the verdict of the jury and grant her a new trial on the grounds that said verdict is contrary to the law and the evidence, which motion having been heard by the Court is overruled, to which action of the Court the defendant, by counsel, duly excepted. Whereupon it being demanded of her if anything for herself she had or knew to say why the Court should not here and now proceed to pronounce judgement against her according to [fol. 8] law, and nothing being offered or alleged in delay of judgment, it is therefore considered by the Court that

the said Catherine Clinton, alias Katherine Clinton, be confined in the Penitentiary of this Commonwealth for the term of Five Years and fined the sum of $500.00, subject to a credit of no days spent in jail awaiting trial. Thereupon the defendant, by counsel, moved the Court for time in which to apply for a writ of error to said judgment, which motion is granted and it is ordered that the execution of the aforesaid judgment be suspended for the period of sixty days or until the Supreme Court of Appeals of Virginia deny said writ if prior thereto and her bail bond fixed at $20,000.00.

And the prisoner was remanded to jail.

IN THE CORPORATION COURT OF THE CITY OF NORFOLK

NOTICE OF APPEAL AND ASSIGNMENT OF ERROR— Filed April 20, 1962

To: Mr. W. L. Prieur, Jr., Clerk

The undersigned, counsel for Catherine Clinton, the defendant in the above styled cause, hereby gives notice of appeal from the order entered in said cause on the 22nd day of March, 1962, and sets forth the following assignments of error:

(1) That the Court erred in refusing to grant a mistrial because of the improper and highly prejudicial evidence, over the timely objection made thereto by defense counsel, during the course of the testimony of one S. M. Edwards, who had been called, in the presence of the jury, to testify on behalf of the Commonwealth.

(2) The Court erred in refusing to grant defendant's instructions numbered D-2 and D-3.

(3) That the Court erred in refusing to strike the testimony of Police Officer Beach, and not directing the jury to disregard the same; the Court further erred in overruling the defendant's timely motions to exclude the evidence obtained and made available to the Commonwealth through unlawful search and seizure.

(4) That the Court erred in refusing to grant the motion to *stride* the Commonwealth's evidence on the basis that the [fol. 9] same was insufficient to support a conviction, and that the Court further erred in its failure to set aside the verdict and to grant a new trial on the grounds that the verdict was contrary to the law and the evidence.

Catherine Clinton, By Herbert S. Reid, Jr., Counsel.

Filed 4/20/62.

Ira B. White, D. C.

Excerpts From Transcript of Testimony

MRS. EMILY PORTER, a witness called in behalf of the Commonwealth, having been first duly sworn, was examined and testified as follows:

Direct examination.

Examined by Mr. Whitehurst:
(Commonwealth's Attorney)

Q. State your full name.
A. Emily Porter.
Q. You live where?
A. 9630 1st View.
Q. Is that in the City of Norfolk?
A. Yes, sir, it is.
Q. How do you make your living?
A. I am desk clerk at the Sea Isle Motel.
Q. Where is that located?
A. 315 East Ocean View Avenue.
Q. Mrs. Porter, I show you this registration card marked "C1" and I ask you if you can identify it.
A. Yes, sir.
Q. What is it?
A. It is a registration card for an apartment.
Q. Where?
A. 9630 1st View.
Q. Is that in the City of Norfolk?
A. Yes, sir.

Q. Who rented that apartment?
A. Mrs. Morrison.
Q. Who is Mrs. Morrison?
[fol. 10] A. This is Mrs. Morrison.

(Witness indicates Catherine Clinton, Defendant.)

Q. The defendant? Catherine Clinton?
A. Yes, sir.
Q. I notice the signature of Mr. and Mrs. Charles Morrison. Did you sign that?
A. No, sir. She signed this.
Q. Who signed Mr. and Mrs. Charles Morrison?
A. I think they, well, they were both together, but I think she signed it herself.
Q. They were both here?
A. Yes, sir.
Q. Mrs. Porter, without saying anything, now I ask you to look at the person who just stepped into the room.
A. Yes, sir.

Mr. Whitehurst: He may go out of the room.

Q. Can you identify him?
A. That is Mr. Morrison.
Q. Were they the two who rented this apartment?
A. Yes, sir.
Q. What is the rent for this apartment?
A. That was $25.00 a week. They paid by the week.
Q. Who paid the rent?
A. Mrs. Morrison.
Q. And by Mrs. Morrison, who do you mean?
A. That is Mrs. Morrison there.
Q. Is that the defendant you refer to?
A. Yes, sir.
Q. Who did the talking there when this was rented?
A. Mrs. Morrison.
Q. Answer her counsel's questions.

* * * * * * *

[fol. 11] S. N. Edwards, a witness called in behalf of the Commonwealth, having been first duly sworn, was examined and testified as follows:

Direct examination.

* * * * * * *

[fol. 15] Mr. Whitehurst:

Q. You related the police came. I asked you to go ahead and relate what clothes, if any, the Taylor girl had on at that time.

A. Vaguely, she was in a state of undress at that time.

Q. Answer questions of the defendant's lawyer.

* * * * * * *

[fol. 16] Mrs. Catherine Taylor, a witness called in behalf of the Commonwealth, having been first duly sworn, was examined and testified as follows:

Direct examination.

Examined by Mr. Whitehurst:

Q. State your name, please.

A. Catherine Taylor.

Q. You live where?

A. 5008 Bruce Street.

Q. How old are you?

A. Thirty-eight.

Q. You are thirty-eight years of age. Are you married at this time?

A. Yes, I am.

Q. How many times have you been married?

A. Twice.

Q. How many children do you have?

A. Four at home right now.

Q. How long have you known the defendant?

A. About eleven years.

Q. Did you have a discussion with the defendant at the Colonial Restaurant last year?

A. Yes, sir, I did.

Q. Where is the Colonial Restaurant located?

A. Corner of Colonial and Olney Road.

Q. About when was this conversation, do you know?

A. I believe sometime the 1st of September; somewhere along there.

Q. Of 1961?

A. Yes, sir.

[fol. 17] Q. How did you happen to be there at the time?

A. We had talked over the phone and we had made an arrangement to be there.

Q. Whose idea was it to be there?

A. That was just a place. We both knew where it was. We both had an apartment on the opposite corner one time.

Q. Who called whom?

A. She called me because I had no way of reaching her at home.

Q. She called you. Do you know her voice? Can you identify her voice?

A. Oh, yes.

Q. What did she tell you on the telephone?

A. Well, we just discussed over the phone how long it had been since we had seen each other because we had lost contact with each other for several years and we said we would like to see each other. Like I say, we hadn't seen each other in years and we just agreed to meet somewhere and talk.

Q. Did you know of any particular purpose for your meeting other than what you just said?

A. Just friendship.

Q. Now, will you relate what was discussed?

A. She said she had married "Stormy" in the meantime and how many children I had and just general conversation in the beginning.

Q. Go ahead.

A. Then we finally got around to talking about our financial difficulties and she said she had $1,000.00 fine she had to pay and I was talking about bills which I had to pay and she said that if it was agreeable that she had some numbers that she could contact and we could both make some money.

Q. Did she describe the numbers to contact in any other language?

A. Well, I knew what she was talking about. They would be paid dates.

Q. What else was discussed concerning that?

A. She said she had some very good numbers and if we could get a nice apartment that we could really make some money.

Q. What about the numbers?

A. Sir?

Q. What did she mean by "nice numbers"? Did she describe that?

A. She said she had the best clientele in town; the men [fol. 18] were the best known men in town. The best clientele in town. She said we would have to have a nice place.

Q. I show you this book and ask you if you can identify it.

A. Yes. This is the book that had some of the numbers in it.

Q. Whose book is that?

A. Catherine's.

Q. The defendant's book. When did you first see that book?

A. Down at Ocean View.

Q. Where at Ocean View?

A. You mean the address? 1st View Street is all I know; Apartment 103.

Q. Is that the place where the arrest was made?

A. Yes, sir.

Q. You saw the book there. Under what circumstances did you see it?

A. She gave me some numbers to copy out of here which I wrote in a little blue book and there were some numbers called from here, I believe.

Mr. Whitehurst: Your Honor, we offer this book in evidence.

The Court: "Commonwealth's Exhibit 2."

Mr. Whitehurst:

Q. Any further conversation at Colonial Restaurant?

A. Not there. She contacted me later.

Q. Who was at the restaurant? You and the defendant and who else?

A. Yes; and later on, her husband came in and later on, Mr. Jager came in.

Q. Her husband, what is his nickname?

A. "Stormy."

Q. What is his name, actually?

A. Harry, I believe.

Q. And his last name would be—

A. Clinton.

Q. When did you next talk to the defendant about the subject matter?

A. I imagine a week and a half. She came to my house a week or a week and a half later.

Q. She came to your house a week later. Tell us what took place.

A. She just asked me was I still interested and that we [fol. 19] should get together, and you know, go look for an apartment and I went to her house.

Q. Where did she live?

A. On Olney Road.

Q. All right.

A. I went there one evening and she and I went out looking at different sections of the town.

Q. Go ahead. What happened next in relation to this?

A. We didn't decide on anything that night and we met later on and she contacted me and told me she had this place at Ocean View.

Q. Did you help her rent the place at Ocean View?

A. No, sir.

Q. When did she call you and tell you she had the place at Ocean View?

A. I believe it was around the 1st of October.

Q. What happened next?

A. We went down there and some numbers were contacted. Catherine called different numbers. In other words, she let the men know that she was in business.

Q. Did you hear her actually talk on the phone or to anyone?

A. Yes, sir.

Q. Tell us what the defendant said. You can repeat each word she said.

A. It would be something like that; "This is Kay. I would like to give you my number. I have something nice." She would partly describe the girls.

Q. How would she describe the girls?

A. Small, large, or according to the color of their hair.

Q. Did you know full well what you were doing?

A. Yes.

Q. Do you think you were doing wrong?

A. Oh, of course I know so now. I knew then, but I know more so now.

Q. Why did you do it?

A. The money sounded good and her and I had been friends and she owed this $1,000.00 fine. I thought I could help her and myself both at the same time.

Q. In relation to the financial situation, what was the set-up? What was your pay?

A. The men paid $10.00. I got $5.00 and she got $5.00.

Q. Why did she get half?

[fol. 20] A. Well, she had the upkeep of the apartment.

Q. Don't tell me what you know the situation to be. Tell this jury what she said. Did she say why she got—

Mr. Reid: I object to the leading nature of these questions.

The Court: Nothing leading about it.

Mr. Reid: I wish to save the point.

Mr. Whitehurst:

Q. Did she state why she got half?

A. Yes. She said she had worked a long time for the numbers and I knew the upkeep of the apartment was her's and she had the telephone bill to pay.

Q. Did you pay the phone bill?

A. Oh, no.

Q. Did you pay any of the linen bill?

A. No.

Q. Did you pay any of the rent?

A. No.

Q. Did you have any of the numbers you had worked up yourself?

A. No.

Q. Did you actually fill any dates there?

A. Yes.

Q. In precise terms, what do you mean by filling a date?

A. A man came there. He paid his money and we had sex relations.

Q. Can you relate how many times you had sex relations there?

A. Seven or eight times. I never kept a record.

Q. Did you pay the defendant any money?

A. Yes. Each day I paid her $5.00.

Q. Did you ever visit at her home at this time? By that I mean what dates are you referring to now; about when? Can you describe the dates?

A. The month was in October.

Q. Do you know where the defendant lived in October?

A. Sewell's Point Road.

Q. You mention Olney Road a while ago.

A. She had moved.

Q. Did you ever call her at her home?

A. I couldn't call her. She had a phone she could call out but we could not call in.

[fol. 21] Q. Do you know how that worked or not?

A. I don't know.

Q. On all of the paid dates that you have just described, did you receive $10.00 on every single date you filled?

A. All the dates I filled there.

Q. What do you mean there? Did you fill dates other than there?

A. I went out, yes.

Q. At whose instructions?

A. A call would come in and she told me where to go; Catherine.

Q. How many did you fill that way?

A. One.

Q. Tell us about that.

A. The call came in and I went to this grocery store.

Q. Did you fill it there?
A. Yes.
Q. How much was that?
A. $20.00.
Q. Did you know the person to whom you were going to fill this date? Did you discuss it with the defendant?
A. Yes.
Q. Tell us that total discussion with the defendant.
A. When she told me, I asked her how much it was and she said he had always paid that to her other girls.
Q. That he had always paid that to the others; to whom?
A. The other girls.
Q. Did you ever discuss this subject with her as to a larger apartment, with the defendant?
A. Yes, sir.
Q. Describe that discussion.
A. She said she knew it was just a temporary set-up, where we were, that it wasn't large enough. There was no privacy there and like I said, she had very good customers and that she had to have larger accommodations where more privacy was because th way it was, the phone was tied up.
Q. What do you mean the phone was tied up?
A. Well, if we were filling a date, we would take the phone off the hook.
Q. Did you discuss that with the defendant?
A. About taking the phone off the hook? She told us while a customer was there to take the phone off the hook.
[fol. 22] Q. She told you that. Was there any discussion about dress; clothing?
A. We were to look our best at all times.
Q. What did she say? Tell us her words.
A. I mean for me, myself.
Q. What you heard the defendant say.
A. She said she would like for me to go to the beauty parlor as soon as we got the money and get my hair fixed and for me to look my best at all times; that certain dresses I had she liked better than others and to wear them.
Q. Was there any discussion concerning other girls?
A. Oh, yes. She asked me if I knew of any other girls and I said that I would see. I had a friend. I said I would talk to her.

I said, "I will introduce you to her and you two can take it from there."

Q. Did you introduce her to another girl?

A. Yes. Helen Buckridge.

Q. Was there ever any discussion concerning younger girls?

A. Yes. She said we were nice but the man liked variety and, of course, they liked younger girls, too.

Q. Were you there when Mr. Edwards came in?

A. Yes, I was.

Q. Describe what took place.

A. You mean from the time he called?

Q. No. From the time he came into the building.

A. Betty Johnson and I were there when he came in and he asked for Kay and he said he liked to talk to the girls and meet them and he said he was an insurance man and he met a lot of men who wanted girls and he just wanted to find out what the set-up was and to find out the price and, in other words, just to look us over.

Q. When was the defendant there?

A. She came in about five minutes later. He wasn't there too long before she came in.

Q. What was the discussion then? Tell us what that was.

A. I introduced them and Mr. Edwards gave her his business card and it was just general conversation at first. She told him she was going to get a larger place. In fact, I believe they were going that day to get a larger place.

She told Mr. Edwards if he gave the number out that the person who called should be sure to identify themselves at the apartment there by Mr. Edwards.

[fol. 23] Q. Did you answer the phone thereafter?

A. Yes.

Q. Can you estimate how many times you answered the phone?

A. If she wasn't there, I answered it. If she was there, she answered it.

Q. Did you ever answer the phone when she was there and a Moody Minyard was there?

A. Yes, I did.

Q. Tell us what took place; not what was said on the

phone but what took place between you and the defendant in words.

A. I answered the phone and I told her who the party on there said they were and she said, "That was a call that came in last night." She told me to find out where he worked. He was supposed to have known Moody.

I questioned the man about where he worked and everything and I related it back to Moody and Catherine.

Q. What did the defendant, Catherine Clinton, say?

A. She told me to be careful, to question him, to find out if he knew Moody and where he worked and what building he worked in because he was supposed to work at the Air Station.

I was relaying messages back and forth. I got tired and turned the phone to Moody.

Q. Was that phone conversation finally concluded?

A. Yes.

Q. What was said then?

A. She said, "It must be the law because Moody didn't know the party on the other end and he finally hung up."

Q. Start again in reference to when Mr. Edwards was there and tell us what happened next. You described the conversation while the defendant was there. Tell us what happened after that.

A. She described the other place she used to have and was talking about a girl with red hair.

Then Catherine and Betty left.

Q. Tell us what happened next.

A. Mr. Edwards said that he would love to have a date with me so we both had just undressed when the law broke in.

Q. Do you know how much money you paid to the defendant?

A. Not exactly. I didn't keep any record of it.

Q. Answer her lawyer's questions.

[fol. 24] Cross examination.

Examined by Mr. Reid:

• • • • • • •

Q. Mrs. Taylor, this particular calling was not new with you, was it?

A. I had worked with Catherine in Richmond before.

Q. You had worked yourself before?

A. Not without her, no.

Q. And you both had a joint venture there?

A. Up in Richmond we would fill dates.

Q. How long had it been prior to October 25, 1961 that you had seen Catherine Clinton? I believe you said you met her around the 1st of October?

A. No. Sometime in the month before that; 5th, 6th, 7th; it was a great many years in there.

Q. Isn't it a fact that you had someone leave a number for Catherine Clinton to call you?

A. Helen Buckridge called me at my home and said "Sammy" can't pronounce his last name, but he was in the place where she was working and had mentioned "Big Catherine" and she had heard me mention "Big Catherine." She said he wouldn't tell her where "Big Catherine" was but if I wanted to contact her, Sam would give Catherine my number.

I said, "That's all right." So Sam gave Catherine my number. About two weeks later she called me.

Q. So this Miss Buckridge was the contact between you and Sam for Catherine to get in touch with you?

A. Yes.

Q. Catherine had just come back to town, had she not?

A. I don't know. I know we had lost contact down through the years.

Q. I believe you stated you went to the Colonial Restaurant?

A. Yes.

Q. What was the conversation?

A. In the beginning we talked about her marrying [fol. 25] "Stormy" in the seven years that had gone by and

I had had children; just the general things we had been doing.

Q. Well, now, you say you had lost contact and out of a clear blue sky you were sitting down carrying on a conversation and somebody said, "Let's open up a house"?

A. No. It wasn't in those words. We got to talking about our financial difficulties. One thing led to another. You don't just come out and say, "Let's open up a house of prostitution."

She had a $1,000.00 fine to be paid and I had bills to be paid.

Q. So you came to a mutual agreement you were to open the place?

A. Yes. She said she would call the numbers if I would fill the dates.

Q. I believe the two of you went out looking for apartments?

A. Yes. I had my car.

Q. At this time were you acquainted with a man known as King Jagers?

A. Yes.

Q. Did you know him very well?

A. Yes.

Q. He had an apartment at Ocean View?

A. He had one. Like I told you the last time, I used to go down and cook his meals, clean up the house.

Q. Your husband knew about that?

A. Yes.

Q. Mutual friends?

A. Well, more than friends. We started out that way but it got to be more than that.

Q. Your husband was aware of that?

A. Yes.

Q. Isn't the truth of it that after you were arrested, you went down there and your husband made you give him back the key to his apartment?

A. Yes, I have given him the key since. He didn't make me go. That was my own idea.

Q. Catherine Clinton, at no time, ever tried to entice you to come into a business?

A. No. Nobody twisted my arm.

Q. It was a mutual agreement?

A. Yes.

Q. That both of you were going to do it for your mutual benefit?

[fol. 26] A. That's right. She had the numbers. I needed the money.

* * * * * * *

Q. I think you stated on one occasion you went out on a date?

A. Yes.

Q. You went out one night?

A. Yes. I said one night.

Q. What time was it?

A. I actually went there twice. I filled the date only once. One time Catherine called me at my home and it was around 9:00 o'clock. I told my husband I had to go carry her somewhere and I went to this store and he said, "No; Catherine is mistaken." He wanted a girl for 12:00 o'clock that night. I said, "I can't come back that late at night." So, I went back the next night.

Q. When you went out to the house on this particular night to fill the engagement, did you tell your husband and children where you were going?

A. No. I was out of the house when I filled the date. The night I left the house, I just talked to him. I told my husband I was going to carry Catherine somewhere.

Q. Mrs. Taylor, growing out of the arrest that took place October 25th at Ocean View, how many charges were placed against you?

A. Three.

Q. Has there been any disposition made of these charges?

A. My lawyer told me and I pleaded guilty to one.

Q. What was done on the one you pled guilty? Was anything done about the charge you entered a guilty plea to?

A. It was a mix-up in court that day. I don't know what happened. My lawyer told me to go home. My lawyer said, as I remember, that they would sentence me or whatever they are going to do.

Q. When are you supposed to go back?

A. I don't know. My lawyer will contact me.

[fol. 27] Q. Were you supposed to go back the day before this trial?

A. I don't know why it was continued. My lawyer called me the same day and we were supposed to go to court the next day and he just said that we didn't have to go; that it had been continued.

I said, "When?" He said, "I will contact you."

Q. What disposition was made of the other two charges? Do you know?

A. No. You would have to ask my lawyer. I don't know.

Q. I believe at one time you were, shall we say, operating in Richmond?

A. I don't know just what you would call it. Her and I worked in a hotel there.

The Court: What did you do? Were you a dishwasher there or a waitress or what?

A. No. We were filling paid dates.

The Court: What do you mean by "filling paid dates?" Were you in the parlor?

A. We were having sex relations.

The Court: This is law business. I don't see why you all don't talk about it in law terms.

Mr. Reid: I feel it is enough garbage, Your Honor, as it is.

Q. Have you talked to anybody about this case since the last trial?

A. Have I talked to anybody? Just Mr. Whitehurst.

Q. Let me ask you this. When you were first arrested, what did you tell the police?

A. Nothing.

Q. You didn't tell them a thing in the world, did you?

A. No. I was scared to death. I just wanted to get out of there.

Q. After you talked to your attorney, he talked to some people?

A. I talked to my attorney and he said for me to tell him the truth or he couldn't help me.

Q. Did he advise you he was going to talk to somebody else?

A. No.

[fol. 28] HELEN BUCKRIDGE, a witness called in behalf of the Commonwealth, having been first duly sworn, was examined and testified as follows:

Direct examination.

Examined by Mr. Whitehurst:

Q. State your name.
A. Helen Buckridge.
Q. How old are you?
A. Forty-three.
Q. Do you know Catherine Taylor?
A. Yes, I do.
Q. How long have you known Catherine Taylor?
A. Quite a few years. She used to be my neighbor five, six, or seven or eight years ago.
Q. How long have you known the defendant, Catherine Clinton?
A. I met her last year sometime around September.
Q. Where did you meet her in September?
A. Puritan Restaurant.
Q. Is that cater-cornered across from Lafayette Presbyterian Church?
A. Yes, it is.
Q. Tidewater Drive and Lafayette Boulevard?
A. Yes.
Q. Tell us what transpired between you and the defendant there. Who else was there?
A. Catherine Taylor.
Q. You and Catherine Taylor?
A. Yes, sir.
Q. Tell us what took place.
A. I went up there with Catherine Taylor and she was to meet Catherine Clinton up there and she said that she needed some money and she was going to start operations and she needed some girls.
Q. I didn't catch that. She—you are referring to whom?
A. Catherine Clinton.

[fol. 29] Mr. Reid: Are you stating what Catherine Taylor or Catherine Clinton—

A. No, sir. This is what was talked about in the car on the parking lot at the Puritan Restaurant.

Mr. Whitehurst:

Q. You are quoting the defendant now?
A. Yes, sir.
Q. Continue.
A. When we got there in the car, Catherine Taylor introduced me to Catherine Clinton. She was telling me that she needed money and she had a fine to pay and that she was going to start operations again if she could get some girls and get a place.
Q. Was going to start operations again if she could get some girls and a place?
A. Yes, and she wanted to know if I was interested.
Q. What did you tell her?
A. I told her at the time I didn't know whether I could but I needed money and I would try.
Q. Any further discussion there?
A. No, I don't believe so; not at that drive-in right then.
Q. When did you next talk to the defendant?
A. We left there and went down to my house.
Q. Any further discussion there about this subject?
A. Yes. She told us that she wanted to get a nice apartment because she had to as she had more or less well-to-do people that she knew from the past. She had their numbers and she would contact them.
Q. Any further discussion?
A. Not at my house then, no.
Q. When did you next talk to the defendant?
A. I had talked to her, I guess, about other things. Different times when she called, we would talk.
Q. When did you next talk to her about this subject?
A. Right after she had gotten the place, the apartment, she called me and told me she had the apartment.
Q. You called her?
A. No, sir. She called me.
Q. She called you?
A. Yes, sir. I had no way of contacting her.
Q. She said what?

A. That she had gotten an apartment and a telephone.
[fol. 30] Q. Did she tell you where she had gotten it?
A. Yes, sir. She said it was out at Ocean View.
Q. Did you go to that apartment?
A. Yes. One day after work I met her at Ward's Corner and she and her husband drove me out to show me where the apartment was.
Q. How long did you stay at that apartment?
A. That day you mean?
Q. The total time.
A. I was only out there two or three times.
Q. What hours were you there?
A. From about 5:00 o'clock until maybe 8:00, 9:00, 10:00.
Q. What hours was Catherine Taylor there?
A. She was there mornings and afternoon because she had to go home.
Q. Did you actually fill any paid dates yourself?
A. Just one.
Q. Was it there?
A. Yes, sir; at the apartment.
Q. How much was the charge?
A. It was $10.00 and I gave her $5.00 of it.
Q. You gave who?
A. Catherine Clinton.
Q. Did you have any discussion with the defendant about a larger apartment?
A. Yes, sir. She said she needed a larger place and more girls as soon as she got started and had gotten in contact with some of the customers she knew.

The Court: What did you give her the $5.00 for?

A. Because she had to pay the rent on the apartment and the phone bill and all and she said she deserved half because she was paying the expenses.

The Court: Half of what?

A. Half of what we got because she had the apartment to keep up.

The Court: How much did you get?

A. I got $5.00.

[fol. 31] The Court: How much total did you get?

A. $10.00.

The Court: For what?

A. One date.

The Court: What is one date? What does that mean?

A. Well—

Mr. Whitehurst: Use the word itself. Describe what a date is. What do you mean?

A. Actually going with a man; having relations with a man.

The Court: What kind of relations?

A. Sexual relations.

The Court: That is so simple. Nobody wants to say it.

Mr. Whitehurst:

Q. The $10.00 itself, how was the price fixed?

A. She made the arrangements. She took the man in the bathroom and talked to him there.

Q. Did you ever discuss a larger apartment with the defendant?

A. She said she was going to get a larger place because she needed a larger one because the one she had was just a one-room one and it could only be one girl in there at the time plus the fact that the phone was tied up while the date was being filled.

Q. What do you mean that the phone was tied up?

A. She told us to take it off the hook.

Q. Take it off the hook when?

A. While the man was there.

Q. Was there ever any discussion concerning younger girls?

A. Yes. She said after she got started that she would have to get younger girls because she figured that was what the men were interested in.

Q. Did you ever discuss clothes with the defendant?

[fol. 32] Mr. Reid: Object to it, Your Honor. It is irrelevant. Nothing to do with the charge before the Court.

The Court: Let's see if it isn't. I heard a hint of it just now.

Mr. Reid: Very well, sir. I withdraw the objection.

Mr. Whitehurst:

Q. Will you answer that question?

A. Yes. One day in particular I wore a street dress. She said it was nice but it wasn't sexy enough.

The Court: What?

A. Wasn't sexy enough.

Mr. Whitehurst:

Q. Any further discussion concerning that?

A. No; except she said we ought to get our hair done and ought to get some of the gray taken out of it.

Q. That you should get some of the gray out of your hair?

A. Yes.

Q. When did you stop doing this?

A. After that date.

Q. Did you know what you were doing?

A. Yes.

Q. Why did you do it?

A. Because I started getting behind in my house payments. The way she described it, I could get money in a hurry and I could get out of debt.

Q. Did you discuss quitting with the defendant?

A. Yes. I told her I couldn't do it any more.

Q. What conversation did you have?

A. She said that was up to me. I said I couldn't go through with it; that I had tried it and it wasn't for me.

Q. Any further discussion on that subject?

A. No.

Q. Did you ever answer the phone there?

A. No; only one time when I believe it was her ex-husband that called.

Q. Was there ever any further conversation concerning answering the phone?

A. Not as far as I was to answer it. She did all the telephoning.

Q. Was there any conversation concerning another place answering the phone?

[fol. 33] A. Yes. I told her that I still needed the money but I would help her any way I could. If she had a place and needed somebody to answer the phone or something, I would do it, and as long as I didn't have to fill a date, I would help her.

Q. Answer her lawyer's questions.

Cross examination.

Examined by Mr. Reid:

* * * * * * *

Q. Were you not the go-between Catherine Clinton and Catherine Taylor to get together?

A. Catherine Taylor had talked about Catherine Clinton, but I believe it was then Catherine Harms and said that she had been good friends and had worked together at some club downtown and said she hadn't heard from her in a long time. She wondered what had ever happened to her.

Mr. Sam Bondeavani.

Q. How do you spell it?

A. That I don't know. I worked with the man. He mentioned the fact that a friend of his had come to town by the name of "Big Catherine." Very few people are called "Big Catherine" or "Little Catherine"; just Catherine this or that, so I associated the name with it.

I mentioned the fact that Catherine Taylor had mentioned she would like to get in touch with her.

Q. That Catherine Taylor would like to get in touch with Catherine Clinton?

A. Yes.

Q. And at this time you didn't know Catherine Clinton?

A. No, I didn't know a thing about her; what she had done or anything.

* * * * * * *

[fol. 34] Officer Earl H. Beach, a witness called in behalf of the Commonwealth, having been first duly sworn, was examined and testified as follows:

Direct examination.

Examined by Mr. Whitehurst:
(Commonwealth's Attorney)

Q. State your name, Officer.
A. Officer Earl H. Beach, Norfolk Police Department.
Q. And your duty assignment?
A. Investigative work.
Q. Did you work with Captain Branch?
A. I did at the time of this case.
Q. In reference to 9630 1st View Street, did you have occasion to go there?
A. I did.
Q. What was your function there?
A. To keep surveillance on an apartment, Apartment 103.
Q. How did you do that?
A. On October 21, 1961, I kept the house under observation from the street.
Q. From the street?
A. Yes.
Q. Later on you kept it from where?
A. From an apartment next door, 102. The apartment in question was 103.
Q. Were you at 102?
A. Yes, sir.
Q. In reference to the 21st, you stated you were on the street?
A. Yes, sir.
[fol. 35] Q. Will you go ahead, sir, and relate what your observations were of the traffic?
A. I arrived at approximately 10:20 A. M., on the 21st at 11:10 A. M. A blue Ford with Wisconsin license 10044 was

parked on the Colonial Store lot, parking lot. At that time a man was seated under the wheel. He began to look at 9630 1st View Street.

He sat in the car for approximately three minutes when a woman came to the window of Apartment 103.

Q. Who was the woman? Do you know?

A. She was later identified as Catherine Clinton. She looked down at the car and she waved and the man in the car waved and approximately four minutes later he got out and went up to the apartment.

The man was identified as Harry Clinton that was in the car.

Q. Go ahead.

Mr. Reid: If Your Honor please, if you would allow me, at this time, I object to this entire line of testimony. We aware of what it amounted to. It is irrelevant, immaterial, and has no probative value to the issue at hand.

The Court: Overruled.

Mr. Reid: I wish to save the point.

Mr. Whitehurst:

Q. Continue, please.

A. Approximately 11:35 P. M., a white male, pardon me, a white female went into 9630 1st View Street, identified as Catherine Taylor. At 11:30 A. M., a white male, wearing work clothes came up in a blue Buick VA132-622. He went up to 9630 1st View Street.

He came out and left at 1:20 P.M. He was identified as Moody Minyard. At 12:00 noon, a white female came out of 9630 1st View Street and went a half block up the street to a bar.

She was identified as Betty Johnson; and at 1:30 P.M., a white female came out of 9630 1st View Street and got into the blue Buick VA161-984, and was identified as Catherine Taylor.

At 2:15 P.M., the blue Ford, Wisconsin license, came back and parked on the rear of Colonial Stores parking lot. At the time, the man, Harry Clinton, he got out and came over to the apartment.

[fol. 36] On the south end, there are steps, brick steps, leading up.

Q. Take a picture and describe to the jury in words the picture of what you are about to say.

Mr. Reid: Identify the exhibit, please.

A. "C-5".

Mr. Whitehurst:

Q. Stand there so the jurors may see.

A. Right here. This exit here would be the south end of the building. Those are the brick steps you can go up with mail boxes right inside the hall here. Brick steps lead upstairs.

These iron steps here are on the north end of the building. You can go up by the iron steps to get up to where the apartments are.

Q. Show them what the rear of the apartment looks like, sir.

Mr. Reid: May I ask you to identify exhibits as you make reference to them so the reporter can get them.

A. The first one is "C-6". This would be in the rear of the apartment house, looking upstairs. The apartments are on the second floor. The first floor is the laundromat.

"C-7" would be the next one. After you get upstairs when you come up from the north to the south end, when you turn to come to the apartment, this would be looking longways here. This would be looking from the north end after you get down the ramp. That leads to the apartment.

"C-8". This is from the rear of the apartment house. The apartment in question is this one here which is Apartment 103. This one here is Apartment 102. This is where I had the apartment under surveillance.

The storm doors on these apartments, when you go up to it, open it, you come back to the right and you have to step inside, and the wooden door, you have to come over behind the storm door to open that just on the opposite side.

"C-9" is another picture of the apartment in the rear.

Mr. Whitehurst: We will pass these around to help the jury.

[fol. 37] Q. Go ahead with your testimony.

A. Harry Clinton started to go up the brick steps on the south of the building. When he did, there was an elderly lady getting mail at the mail box. When he saw her, he came to the circle at the north end and went up the iron steps.

At 3:00 P.M., a white male came out of the apart- [sic] over on the Colonial Stores lot and got in the car and left. At 3:25 P.M., a white male came out of the apartment, Harry Clinton, and went over and got into his Ford and brought it to the front of the Colonial Stores lot and he sat there in the car.

At 3:40 P.M., a white female came out and got into the car with him, which was Catherine Clinton. They both left together.

My next surveillance was October 23, 1961. At this time I was in the apartment next door, Apartment 102. I arrived at this apartment approximately 1:00 P.M. this day.

At that time, 1:00 P.M., the phone rang and a woman answered and stated that she had gone to the store. At 1:20 P.M., the phone rang and a woman answered it. When she hung up, she turned around and told another woman in the apartment that a man in a green and white station—

Mr. Reid: Object unless a proper foundation is laid for it. No foundation is laid for it. It is hearsay testimony and a foundation will have to be laid as to how he could hear from one apartment to the next.

Mr. Whitehurst:

Q. Answer how you could hear from the apartment.

A. Yes, sir. Some of the time I was in the bathroom. From the medicine cabinet you could hear part of the conversation there and I had a device that would amplify the sounds so that you could hear it in the other room.

Mr. Reid: Spiked device?

A. Yes, sir; small device.

Mr. Reid: Object to anything he heard with the spiked device and object to his testimony in its entirety unless he could tell what portion of that he could hear with his ear to the medicine cabinet.

[fol. 38] Mr. Whitehurst: Your Honor, this is also in the next door apartment; listening to what was going on in the apartment that this defendant forged a name. I suggest this is material for the jury to hear. What he can hear, whether he used a device or had a hearing aid or even put on glasses, that gets to the truth and should come in.

Mr. Reid: On the basis of the spiked device, Your Honor, it is an unreasonable seizure under the 4th Amendment of the Constitution. As such I submit to the Court it is not admissible. Secondly, the police officer testified that part of the conversation he could hear through the medicine cabinet.

Unless he can qualify as to what portion of that he heard through that, I submit that his testimony should be stricken en toto.

The Court: Overruled. Exception noted.

Mr. Reid: Save the point, if Your Honor please.

A. At 1:20 P.M., the woman answered the phone and hung up. She told the other woman—

Mr. Reid: Your Honor, there has not been a proper foundation laid for that.

Mr. Whitehurst: Your Honor, this is the apartment that is run and operated and forged to get by this defendant. Everything that goes on in there is very material to this case.

Mr. Reid: Hearsay testimony, if Your Honor please.

The Court: Let me ask you this. Do you claim that something that somebody else other than herself said in her absence is admissible?

Mr. Whitehurst:

Q. Just repeat what you heard the defendant say, Officer. Don't testify to anything but what you heard the defendant say. Relate the traffic, but only what was said by the defendant.

A. Approximately 2:15 P.M. on the 23rd, a white male came up and entered the apartment. Approximately 3:00 P.M., the same white male, approximately 5 feet 10, 160-170 pounds, light gray sweater, approximately 35 years old, blond hair, left.

3:05 P.M., Catherine Clinton arrived at the apartment. 3:18 P. M., the phone rang. Catherine Clinton answered the phone and she told the party on the other end, she said, "No, Honey. We had one and he was Shore Patrol."

[fol. 39] The Court: What?

A. She said, "We had one and he was Shore Patrol." At 3:30 P.M., the phone rang. Catherine Clinton answered it and she told the party on the other end, she said, "Make it as early as possible as she has to go home."

4:25 P. M., a white male came up, rang the door bell to Apartment 103. The door was opened. The man went in. He asked for a girl to come to his apartment. He told the woman he was talking to that he would—

Mr. Reid: Object. He said he told the woman he was talking to—

Mr. Whitehurst:

Q. The defendant was present?
A. Yes, sir.

Mr. Reid: I withdraw the objection.
The Court: Go ahead.

A. This man stated he would be in his apartment in thirty minutes and he wanted a woman. At that time, Catherine Clinton said that she would send her around. At that time, the white male left and Catherine Clinton followed him out. She came out on the ramp. She had one hand holding the storm door and stood on the ramp.

She looked to the north and to the south and turned around and went back into the apartment.

Q. Continue, sir.

A. The next would be October 24th. On October 24th, I arrived at the apartment approximately 1:07. When I did,

there was a man and a woman in the apartment. At that time I could hear shoes hit the floor and it wasn't long after that that there was a—well, there was a daybed, a sort of a sofa, in the apartment—and I could hear movements on that and I could hear the springs on the sofa squeaking.

At 1:16 P. M., the man and woman went to the bathroom. This time I went to the bathroom and put my ear up to the medicine cabinet.

Q. Don't relate the conversation unless the defendant was there at that time.

[fol. 40] A. No, sir. At 1:27 P.M., this white male left the apartment. He was about 50 or 55 and about 5 foot 9 and weighed about 195 pounds, wearing a red jacket and brown hat.

Approximately 1:35 P.M., a white female in a green coat, white glasses and dark hair left the apartment, got into a 1950 Chrysler; identified as Catherine Taylor.

2:25 P.M., Catherine Clinton arrived at the apartment. When she entered the apartment, she was told by one of the women in the apartment, the girl said, "Bob Merritt called and I told him you would be here at 3:00 or 3:30 at the latest."

2:28 P.M., the phone rang. Catherine Clinton answered the phone and she stated to the party, "Glad you called. I was going to send you home in a cab the other night. Things are slowing down but we are managing to keep our heads above water. Things will be set up tomorrow night."

Approximately 2:37 P.M., a girl identified as Betty Johnson came out of the apartment, went downstairs and met Harry Clinton that was in the blue Ford with the Wisconsin license. She got a package from him and brought the package up to the apartment.

2:44 P.M., the phone rang and Catherine Clinton answered and she stated to the party she was talking to, she said, "You be here at 5:00 o'clock." She said, "I have something working so all of us will have work."

Approximately five minutes after that call, Catherine Clinton went to the phone and I could hear her dialing the numbers. When she got her number, she asked the party, she inquired about an apartment and how much the rent was.

At 3:27 P.M., the phone rang and Catherine Clinton answered the phone and she says, "I don't know a Bob Merritt." Then she paused and said, "What Mr. Cohen?". Then she paused again and she said, "You have Charlie Cohen call me and then you call back."

3:30 P.M., the phone rang. Catherine talked to the party on it and after she hung up, she stated to the other woman in the apartment, she said, "Helen called and will be over at 5:00 o'clock."

At 3:40 P.M., a white male came up and knocked on the door. He was let in the apartment. He was identified as Harry Clinton. This time he and Catherine Clinton got in the conversation. Catherine Clinton was telling him about Bob Merritt called and said, "Charlie Cohen told him to call." At that time Harry Clinton became very ex- [fol. 41] cited. He told Catherine, he said, "Get to the phone and call Charlie and see if he did tell this man to call."

3:47 P.M., Catherine Clinton used the phone. She called and asked for Charlie Cohen and she hung up and told the people in the room he was not in.

3:49 P.M., the phone rang again. Catherine Clinton answered it and she said, "Where are you, Mr. Cohen?". Then she paused and then she said, "You are not Charlie Cohen." She paused again and she said, "I will have to talk to you in person."

At 4:00 P.M., the phone rang, Catherine Clinton answered it, and she said, "Charlie, are you at the store?". She paused and said, "If you give this number out", and she paused again and then she said, "O.K., but always call me first. If he will call, I will be glad to talk to him."

4:07 P.M., Catherine and Harry left the apartment together.

October 25th, at 10:34 A.M., on the 26th of October, a white male entered the apartment. At 10:45 A.M., you could hear the man and the woman up against the wall where the sofa was and everything got quiet and all you could hear were springs on the day bed squeaking.

Approximately 10:52, a man arrived and approximately 11:25 A.M., another man arrived at the apartment. He was let into the apartment and he was identified as a Mr. Edwards.

11:26 A.M., Catherine Clinton arrived at the apartment. They were in there approximately five to ten minutes after Catherine Clinton arrived and Betty Johnson came out of the apartment.

They went downstairs to the parking lot, Colonial Stores parking lot across the street where Harry Clinton was in his blue Ford.

At that time they got into the front seat with him and sat there. At that time was when the arrest was made and Captain Grant and Sergeant Pugh went to Apartment 103 to make the arrest and I went to the Colonial Stores lot and got Catherine Clinton, Harry Clinton, and Betty Johnson.

Q. Answer her lawyer's questions.

Mr. Reid: If Your Honor please, I would like to renew my motion to strike for three reasons; first of which, as I previously stated, the evidence given by the police officer is irrelevant and immaterial. No value whatsoever as far as the application of this charge.

[fol. 42] The Court: Without burdening you to proceed, I think the Court was perhaps in error just now when I ruled in favor of you not admitting hearsay testimony, but as the lawyers well know, hearsay testimony or parties to or up and pursuant to a conspiracy is admissible right on up to a conspiracy.

Mr. Reid: In conspiracy, Your Honor, but this is not a conspiracy.

The Court: I mean a contractual arrangement to carry on a particular proposition. What each party does and says is admissible against the other, but you have been blessed to the extent that I kept it out because the Commonwealth's Attorney in apprehension of what I was going to rule then told the witness only to talk and describe what the defendant said herself.

Mr. Reid: May I ask one question of the Court? Is the Court finding that it was a conspiracy between these three women?

The Court: The Court is not finding a thing, underscored and overscored. The Court will say that the testimony would show an arrangement where, if believed, whereby that would be the case, that there was an agreement to do it.

Mr. Reid: Between the three women, yes, sir. Without going into it, Your Honor, I have made an objection to the officer's testimony.

The Court: Yes. You preserve all your exceptions and objections, Mr. Reid.

Mr. Reid: Yes, sir.

The Court: Of course, you have been blessed to that extent but I overrule you now and you except to whatever it was.

Cross examination.

Examined by Mr. Reid:

* * * * * * *

[fol. 43] Q. This spike, was it driven in the wall?

A. It wasn't driven in.

Q. Stuck in the wall?

A. Yes, sir.

Q. In what portion of the apartment was that?

A. The whole apartment was just one-room efficiency. It would be the wall that was separating the two apartments.

Q. Was it in the center of the wall, the back of the wall, or what?

A. No, sir. It would be closer to the front of the house. It would be a little off from the center of the wall.

Q. And these people you have related are the only people that came and went from the apartment that you specified?

A. That I observed, yes, sir.

Q. Were you in the apartment from the time you have testified to? If you said somebody came and left at a certain time, you were there?

A. Yes, sir.

Q. And these were the only people that came and went?

A. Yes, sir.

Q. Officer Beach, you, of your knowledge, don't know what went on inside that apartment, do you? You are only speculating as to what went on?

A. Yes, sir.

Q. You don't know if they were shaking dice on the bed, playing cards, moving the bed, throwing shoes on it?

A. I don't think they were shooting dice or anything.

Q. From your own knowledge, you don't know what was going on to make the bed squeak, do you?

A. No, sir.

Q. Were you present when the officers subsequently went into the apartment?

[fol. 44] A. I was up to the door with the officers and I left before they went in and I went down to the parking lot.

Q. Did anyone have a search warrant?

A. I couldn't say.

Q. Do you think anyone had a search warrant?

A. I don't know.

Q. Was Captain Grant and the other police officers in your presence, when they were in your presence, was anything discussed about a search warrant?

A. Not in my presence.

Q. There was time to acquire a search warrant, wasn't it?

A. From the time we made the arrest?

Q. You had the apartment under surveillance how many days before making the arrest?

A. Four days.

Q. And from your knowledge, no warrant was secured?

A. I don't know of any.

Q. Where were you at the time of the arrest?

A. I was present when a small window was broken.

Q. How was it broken?

A. With an iron, I believe.

Q. By whom?

A. I don't know, I couldn't say which officer did it.

Q. Anyone knock on the door?

A. I heard the officers say, "Police officers. Open the door."

Q. After the window was opened?

A. After I left and went to the parking lot.

Q. When he said, "This is the police officer," this was after the window was broken?

A. Correct.

Q. Did either of the police officers say they had a search warrant?

A. I didn't hear. When they said they were police officers, I went to the parking lot.

Q. You assisted in the physical arrest of whom?

A. I went down and told Catherine and Harry Clinton and Betty Johnson that we were holding them for investigation.

Q. Your remark to them was, "We are holding you for investigation"?

A. It was.

* * * * * * *

[fol. 49]

MOTION TO STRIKE EVIDENCE AND RULING THEREON

Mr. Reid: Very well, Your Honor. Secondly, I would like to renew my motion as to striking the evidence of Officer Beach for the purpose that it was irrelevant, immaterial, and it had nothing to do with the case before the Court.

Also, the evidence of Officer Beach admittedly was obtained in part, not *en toto,* by a listening device which was stuck into the wall.

According to the decision of the Supreme Court of the United States, it was unlawful as search and seizure. According to the search warrant, any evidence received from [fol. 50] the apartment where that book came from would be unlawful seizure. I would like to ask the Court to strike that evidence.

Thirdly, without going into a great deal of argument, I would move the Cour. to strike the entire Commonwealth's case on a failure to present a *prima facie* case. I will not argue the case at great length. The Court has heard it.

I don't feel there has been any corroboration of anything that has been admitted to the Court which the Court labelled as conspiracy, one of three conspirators and if the finding of the Court is that there was a conspiracy between the three of these parties, then the whole case of the Commonwealth must fail.

Mr. Whitehurst: May it please the Court, counsel is just as wrong in quoting you in saying what you have done as he is in relating the conclusion of the facts.

The Court: You have got to separate these things. When I was ruling on Mr. Reid's testimony favorably, you then instructed the officer to proceed.

I ruled hearsay but to not tell anything thereafter. I ruled not to tell anything except what the lady did or said herself.

Then he objected to the sticking of the instrument in the wall, the aid for hearing. So far as I am concerned, what she said is definitely admissible and I believe that I ruled more favorable to Mr. Reid than he was entitled to when I come to think of it.

• • • • • • •

The Court: I will let it go to the jury and that's it. I overrule all motions.

Mr. Reid: I would like the record to show I note my exception.

• • • • • • •

[fol. 54]

IN THE SUPREME COURT OF APPEALS OF VIRGINIA

Record No. 5558

CATHERINE CLINTON

—v.—

COMMONWEALTH OF VIRGINIA

OPINION BY JUSTICE HAROLD F. SNEAD—April 22, 1963

From the Corporation Court of the City of Norfolk, H. Lawrence Bullock, Judge.

Catherine Clinton was indicted on two counts charging (1) that she did feloniously receive money from the earnings of Katherine R. Taylor, who was engaged in prostitution, for a consideration not deemed good and valuable in law in violation of § 18.1-208, Code of 1950, as amended, and (2) that she did unlawfully and feloniously place Katherine R. Taylor in a house of prostitution with intent that she should live a life of prostitution in violation of § 18.1-205. The jury found defendant guilty as charged

under the first count and fixed her punishment at 5 years imprisonment and a fine of $500. The trial court overruled defendant's motion to set aside the verdict on the grounds that it was contrary to the law and the evidence and entered judgment in accordance with the verdict. We granted defendant a writ of error.

The defendant did not testify or offer any evidence in her behalf.

The evidence discloses that the defendant and Mrs. [fol. 55] Katherine Taylor had been friends for quite awhile, but had not seen each other "in years". In September 1961, pursuant to a telephone call made by defendant to Katherine Taylor the parties met in a restaurant in the city of Norfolk. There they had a "general conversation." They discussed their financial difficulties. Defendant revealed that she had a $1,000 fine to pay and Katherine Taylor said she had unpaid bills. Defendant stated that she had "some numbers that she could contact and we could both make some money"; and that "she had the best clientele in town."

About 10 days later defendant went to Katherine Taylor's home to ascertain if she was still interested in the proposition. Later they toured different sections of the city to locate an apartment, but a location was not decided upon. Subsequently defendant advised her that she had rented an apartment at Ocean View. According to the landlord's desk clerk, defendant, who was accompanied by her husband, Harry Clinton, rented the one-room efficiency apartment at 9650 1st View Street in the fictitious name of "Mr. and Mrs. Charles Morrison." Katherine Taylor testified that defendant called "different numbers" to let "the men know that she [defendant] was in business." When asked what her compensation was, she replied that the men paid $10 and that she received $5. Defendant re- [fol. 56] ceived one-half because she had the "numbers" and had to pay the telephone bill and the "upkeep of the apartment." With one exception, all of the engagements Katherine Taylor had with men for sexual intercourse secured by defendant were had at the defendant's apartment. Prostitution was not a new experience for Katherine Taylor. She testified that she had formerly worked with defendant in Richmond.

The defendant's apartment was kept under surveillance by Norfolk police officers for four days, during which time they observed men visit the apartment. Part of the time officer Earl H. Beach was stationed in the adjoining apartment where he heard conversations and sounds which tended to show that the premises were used as a house of prostitution. This evidence was obtained by listening through the medicine cabinet in the wall dividing the two apartments and by an amplifying device "stuck in the wall."

On the morning of October 25, 1961, a man, later identified as S. N. Edwards, entered the apartment. The defendant arrived shortly thereafter. About 10 minutes later she and Betty Johnson left the premises and took a seat in Harry Clinton's automobile which was parked across the street in the Colonial Stores' parking lot. The police officers broke the glass in the door of the apartment, entered and found [fol. 57] Katherine Taylor and Edwards undressed and preparing for sexual intercourse. They, along with defendant, her husband and Betty Johnson, were taken into custody and the indictment of defendant followed.

Here, defendant argues that the trial court erred (1) in refusing to declare a mistrial for admitting certain evidence of S. N. Edwards which tended to show that she formerly operated a house of prostitution at another place; (2) in admitting evidence obtained in the adjoining apartment through the use of a mechanical listening device stuck in the wall which separated the two apartments; and (3) in refusing Instruction No. D-3. These questions will be discussed in the order mentioned.

S. N. Edwards testified that after a telephone conversation with defendant he went to her apartment. There the conversation between the two was "more or less a sparring deal" as he was attempting to identify himself and show he was not connected with law enforcement. He told her that the purpose of the visit was to meet her and look the place over as he had out-of-town friends who might be interested in contacting her.

On direct examination Edwards testified as follows:

"Q. Tell us what actually was said. • • •

[fol. 58] "A. All right; what I said first. I told her that I thought her name was familiar and I asked her if she operated in the other place in town.

"The Court: Operated what? * * * ?

* * * * * * *

"A. Well, a house of prostitution, but those words weren't used. I didn't ask her.

"The Court: What did you use? How did you come to the understanding?

"A. Just what I said, sir, because it was obvious what was going on. It was just a line of conversation and it was taken, well, that both parties knew what was going on.

"She asked me if I had ever visited places down at East Ocean View and I told her I had not and she mentioned some other places, I believe, but I don't recall where it was and I said no, that I had never visited any other places.

"Then I asked her, to prolong the conversation, if she was ever down at Lynnhaven.

"Mr. Reid: Your Honor, I object to this.

"The Court: Overruled.

"Mr. Reid: I save the point.

"A. She says, 'Yes, I did.' I said, 'Well, did you have a young girl working for you that had long hair and wore it up in a pony tail, about five years ago?' Then she mentioned some name which was vague to me because I was just carrying on a conversation and Mrs. Clinton and this Betty were dressing, that is, putting on their hats, getting ready to go out."

The defendant now argues that the Commonwealth was thus allowed to present evidence that five years previously the defendant ran a house of prostitution; and that [fol. 59] to compound the error further evidence was allowed tending to show that the defendant had a young girl working for her at that time.

But she made no such objection. Her objection was to the question asked her by Edwards whether "she was ever down at Lynnhaven." She offered no objection at all to the further question asked her by Edwards about a young

girl working for her about five years ago, and she made no answer to that question.

Rule 1:8 of the Rules of Court requires that the grounds for objection to the admissibility of evidence be stated with reasonable certainty, and if it does not appear from the record to have been so stated, "such objections will not be considered by this Court except for good cause shown or to enable this Court to attain the ends of justice." Here, counsel for defendant stated no reason for the objection to Edwards' testimony under question at the time it was made and offered no motion to strike such evidence. Counsel merely said "Your Honor, I object to this." After the objection was overruled, counsel stated "I save the point."

Moreover, Katherine Taylor thereafter testified without objection that defendant told her before the apartment was rented "she had the best clientele in town." She stated that defendant during her conversation with Edwards [fol. 60] "described the other place she used to have and was talking about a girl with red hair." On cross-examination she testified that she had "worked with" defendant in Richmond. The time was not designated, but it must have been several years prior to this incident because she had previously stated that she had not seen defendant "in years."

Helen Buckridge said she had only one "paid date" in the apartment for which she received $10 and that she gave defendant one-half of it. At the time she was introduced to defendant, she stated that defendant told her "she needed money and she had a fine to pay and that she was going to start operations again if she could get some girls and get a place." There was no objection made to this testimony. The testimony of Helen Buckridge and Katherine Taylor clearly established that defendant had formerly operated such an illicit business.

Aside from the fact that the grounds for the objection to Edward's testimony were not stated at the time the objection was made, there has been no good cause shown why the requirement of Rule 1:8, *supra,* should not be applied. The evidence amply supports the conviction of the defendant and it is not necessary to disregard the requirement to state the grounds for objection with reasonable certainty in order to attain the ends of justice.

[fol. 61] Here the Commonwealth was not seeking to prove independent and unconnected crimes in violation of the settled principle recently stated in *Fleenor* v. *Commonwealth*, 200 Va. 270, 275, 105 S. E. 2d 160. Evidence of other offenses may be admitted only when it shows motive, intent or guilty knowledge, or is connected with or leads up to the offense for which the accused is on trial, *Colvin* v. *Commonwealth*, 147 Va. 663, 669-70, 137 S. E. 476; or when there is only incidental disclosure of other offenses, *Barber* v. *Commonwealth*, 182 Va. 858, 867, 30 S. E. 2d 565. The evidence now claimed to be error came from the defendant in a conversation with Edwards in which the defendant's object, according to Edwards, was "to make sure I wasn't a member of the law or something like that" and, as stated, the only objection she made was to the question of whether she was ever down at Lynnhaven, to which she replied, "Yes, I did."

At the conclusion of the Commonwealth's evidence, defendant moved for a mistrial on the grounds that the testimony of Edwards relating to the former operation of a house of prostitution was prejudicial and improper and that there was no basis for its admission. This motion and others made at the time were overruled.

Whether a motion for a mistrial should be granted or [fol. 62] refused rests within the sound discretion of the trial court, and the exercise of this discretion will not be disturbed unless abused. *Braxton* v. *Commonwealth*, 195 Va. 275, 279, 77 S. E. 2d 840; *Mack* v. *Commonwealth*, 177 Va. 921, 927, 15 S. E. 2d 62; 23A C. J. S., Criminal Law, § 1384, pp. 1027,-1028. Such a motion should be promptly made after a party has full knowledge of the facts and circumstances relied upon. *Crockett* v. *Commonwealth*, 187 Va. 687, 706, 707, 47 S. E. 2d 377.

We find that it was not reversible error for the trial court to admit Edward's testimony in question, and that the trial court did not abuse its discretion in overruling the motion for a mistrial at the conclusion of the evidence.

The defendant contends that the use by an officer of a mechanical listening device stuck in the partition wall of an adjoining apartment in obtaining evidence constituted an

unlawful search and seizure under the Fourth Amendment to the Constitution of the United States and Section 10 of the Constitution of the State of Virginia. Thus, she says that it was reversible error to admit such evidence.

Goldman v. *United States,* 316 U. S. 129, 62 S. Ct. 993, 86 L. Ed. 1322, involved a situation where Federal agents [fol. 63] placed a detectaphone against a partition wall and heard conversations between members of a conspiracy. There was no physical invasion of the premises occupied by defendant in obtaining this evidence. The court held that the questioned evidence was not inadmissible on the ground that use of the detectaphone was in violation of the Fourth Amendment.

The defendant relies heavily upon *Silverman* v. *United States,* 365 U. S. 505, 81 S. Ct. 679, 5 L. Ed. 2d 734. There the petitioners were convicted on an indictment charging certain gambling offenses. Police officers were permitted to testify as to incriminating conversations between the petitioners which were overheard through an electronic listening device. This device was described as a microphone with a spike approximately one-foot long attached to it and it also consisted of an amplifier, earphones and a power pack. The officers entered a vacant house and inserted the spike several inches into a crevice of the party wall and made contact with a heating duct which served the adjoining house occupied by the petitioners. Such contact converted petitioners' entire heating system into a conductor of sound and conversations in the house could be heard through the earphones.

In holding that the use of the device violated the Fourth [fol. 64] Amendment, the court observed: "* * * For a fair reading of the record in this case shows that the eavesdropping was accomplished by means of an unauthorized physical penetration into the premises occupied by the petitioners. * * *." It pointed out that in the *Goldman* case, *supra,* "the eavesdropping had not been accomplished by means of an unauthorized physical encroachment within a constitutionally protected area", and expressly declined to "re-examine" the case.

The *Silverman* case is factually different from the case at bar and it is not controlling. Officer Beach was asked if the instrument used was a spiked device and he responded "Yes, sir; small device." That is the only description given of it. The uncontradicted evidence is that it was not driven into the wall, but was "stuck in" it. This is the only evidence as to any penetration of the party wall and it is reasonable to assume that the penetration was very slight such as one made by a thumb tack to hold the small device in place. The record does not show that the eavesdropping was accomplished through "an unauthorized physical penetration into the premises" occupied by defendant. Thus, we hold that the evidence obtained by means of the listening device did not constitute a violation of the Fourth Amend-
[fol. 65] ment to the Constitution of the United States or Section 10 of the Constitution of the State of Virginia, and that it was not error to admit such evidence.

Finally, defendant argues that the trial court erred in refusing to grant Instruction No. D-3. It reads:

"The Court instructs the jury that, while they may find a verdict upon the unsupported testimony of an accomplice, such evidence is to be received with great caution, and the Court, in this case, warns the jury of the danger of basing a verdict on the unsupported testimony of an accomplice.

"The Court further instructs the jury that the testimony of an accomplice must be received with great care and caution, and if you believe the testimony of an alleged accomplice was false, and that he was induced to testify falsely either by fear of punishment or hope of reward, you must disregard that testimony in its entirety."

The defendant says that she was entitled to this instruction because there was evidence that Katherine Taylor was an accomplice and no direct corroborating evidence that she received money from Katherine Taylor's earnings as a prostitute, and because Katherine Taylor had hope of reward of receiving a lighter sentence on a conviction for which she had not been sentenced.

As a result of the raid on defendant's premises three misdemeanor charges were placed against Katherine

[fol. 66] Taylor. At the time of defendant's trial two of the charges had been dismissed and she had been convicted on a plea of guilty to the third charge, but had not been sentenced as the case had been continued for that purpose. Captain Charles D. Grant testified that she had "been promised nothing" by the police.

If Katherine Taylor was not an accomplice, or if the verdict did not rest on her unsupported testimony, then it was not error to refuse the instruction.

"The general test to determine whether or not a witness is an accomplice is to determine whether he could be indicted for the same offense." *Guthrie* v. *Commonwealth,* 171 Va. 461, 469, 198 S. E. 481, and cases there cited.

State of Arizona v. *Green,* 60 Ariz. 63, 131 P. 2d 411, involved a question of whether the prosecuting witness whose earnings defendant was accused of receiving was an accomplice. In holding that the test to be applied was whether she could be indicted for the same crime, the court stated:

"* * * It is obvious that the prosecuting witness could not have been tried for receiving the earnings of a prostitute from herself. We think, therefore, that she was not an accomplice within the meaning of the statute, * * *." 60 Ariz. at pp. 67, 68, 131 P. 2d at p. 413.

Katherine Taylor, a prosecuting witness, could not have [fol. 67] been legally indicted under § 18.1-208 for receiving money from her own earnings as a prostitute for a consideration not deemed good and valuable in law. Such being the case, under the principle enunciated in *Guthrie* v. *Commonwealth, supra,* she was not an accomplice. Moreover, her evidence was not unsupported, and the trial court was correct in refusing Instruction No. D-3.

For the reasons stated the judgment appealed from is

Affirmed.

[fol. 68]

IN THE SUPREME COURT OF APPEALS OF VIRGINIA

CATHERINE CLINTON, Plaintiff in error,

against Record No. 5558

COMMONWEALTH OF VIRGINIA, Defendant in error.

Upon a writ of error and supersedeas to a judgment rendered by the Corporation Court of the City of Norfolk on the 22nd day of March, 1962.

JUDGMENT—April 22, 1963

This day came as well the plaintiff in error, by counsel, as the Attorney General on behalf of the Commonwealth, and the court having maturely considered the transcript of the record of the judgment aforesaid and arguments of counsel, is of opinion, for reasons stated in writing and filed with the record, that there is no error in the judgment complained of. It is therefore adjudged and ordered that the said judgment be affirmed, and that the plaintiff in error pay to the Commonwealth thirty dollars damages, and also her costs by her expended about her defense herein.

Which is ordered to be forthwith certified to the said corporation court.

A Copy,

Teste:

H. G. Turner, Clerk.

Defendant in error's costs:

Attorney's fee	$50.00
Printing brief	40.00
Total	$90.00

Teste:

H. G. Turner, Clerk.

[fol. 70] Certificate to foregoing transcript (omitted in printing).

[fol. 71]

SUPREME COURT OF THE UNITED STATES

No. 294—October Term, 1963

CATHERINE CLINTON, Petitioner,

vs.

VIRGINIA.

ORDER ALLOWING CERTIORARI—Filed December 9, 1963

The petition herein for a writ of certiorari to the Supreme Court of Appeals of the Commonwealth of Virginia is granted, and the case is placed on the summary calendar.

And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.

BLANK
PAGE

FILE COPY

Office-Supreme Court, U.S
FILED
JUL 19 1963
JOHN F. DAVIS, CLERK

IN THE

Supreme Court of the United States of America

OCTOBER TERM, 1962

No. 294

CATHERINE CLINTON

Peititoner

vs.

COMMONWEALTH OF VIRGINIA

Petition for a Writ of Certiorari to the Supreme Court of Appeals of the Commonwealth of Virginia

[redacted]

CALVIN H. CHILDRESS
343 Law Building
Norfolk 10, Virginia
Counsel for Petitioner

BLANK
PAGE

IN THE

Supreme Court of the United States of America

OCTOBER TERM, 1962

No.

CATHERINE CLINTON

Peititoner

vs.

COMMONWEALTH OF VIRGINIA

Petition for a Writ of Certiorari
to the Supreme Court of Appeals
of the Commonwealth of Virginia

BRIEF FOR THE PETITIONER

CALVIN H. CHILDRESS
343 Law Building
Norfolk 10, Virginia
Counsel for Petitioner

BLANK
PAGE

INDEX

	Page
Opinions Below	1
Jurisdiction	2
Questions Presented	2
Constitutional Provisions Involved	2
Statement of the Case	3
Reasons for Granting the Writ	7

AUTHORITIES

Cases

Boyd vs. *United States,* 116 U. S. 616, 630, 6 S. Ct. 524, 532 29 L. Ed. 746 11

Clinton vs. *Commonwealth,* 204 Va. 275 1

Goldman vs. *United States,* 316 U. S. 129, 62 S. Ct. 993, 86 L Ed. 1322 11

Lopez vs. *United States,* 83 S. Ct. 1381 11

Mapp vs. *Ohio,* 367 U. S. 643, 6 L. Ed. (2d) 1081... 10

Olmstead vs. *United States,* 277 U. S. 438, 48 S. Ct. 564, 72 L. Ed. 944 12

On Lee vs. *United States,* 343 U. S. 747, 766-767, 72 S. Ct. 967, 977-978 9

Silverman vs. *United States,* 365 U. S. 505, 81 S. Ct. 679, L. Ed. (2d) 734 7

MISCELLANEOUS

Dash, Knowlton and Schwartz, *The Eavesdroppers* 8

BLANK
PAGE

IN THE

Supreme Court of the United States of America

OCTOBER TERM, 1962

No.

CATHERINE CLINTON

Petitioner

vs.

COMMONWEALTH OF VIRGINIA

Petition for a Writ of Certiorari to the Supreme Court of Appeals of the Commonwealth of Virginia

BRIEF FOR THE PETITIONER

OPINIONS BELOW

There were no reports of the trial court's decisions.

The Decision of the Supreme Court of Appeals for Commonwealth of Virginia has been reported in the advance sheets as *Clinton* vs. *Commonwealth,* 204 Va. 275. A copy of said opinion is annexed as Appendix A.

JURISDICTION

The judgment o fthe Supreme Court of Appeals for the Commonwealth of Virginia was entered on April 22, 1963; there were no petitions for rehearing and no orders granting an extension of time in which to petition for a Writ of Certiforari. The jurisdiction of this Court is invoked pursuant to 28 U.S.C.A., Section 1257 (3).

QUESTIONS PRESENTED

Whether evidence obtained by City Police Officers through the use of a spiked microphone stuck into a partywall separating adjoining efficiency apartments, which enabled the Police Officers to overhear everything said in the contiquos private efficiency apartment occupied by petitioner, is admissable against the petitioner in a State Court.

CONSTITUTIONAL PROVISIONS INVOLVED

Fourth Amendment, Constitution of the United States:

"The right of the people to be secure in their persons, houses, papers and effects, against unreasonable searches and seizures, shall not be violated, and no warrants shall issue, but upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized."

Fifth Amendment, Constitution of the United States:

"No person shall be heard to answer for capital or otherwise infamous crime, unless on a presentment or indictment of a grand jury, except in cases arising in the land or naval forces, or in the militia, when in actual service in time of war or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb, nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty or property without due process of law; nor shall private property be taken for public use, without just compensation."

STATEMENT OF THE CASE

A two count indictment was returned by the Grand Jurors at the December, 1961 term of the Corporation Court of the City of Norfolk, Virginia. The petitioner was chraged with the violation of 18.1-208 of the Code of Virginia 1950 as amended, knowingly receiving money from the earnings of a prostitute, not being for consideration deemed good or valuable in law, and of violation of 18.1-205 of the Code of Virginia 1950, as amended, unlawfully placing a female in a house of prostitution with the intent that she should live the life of a prostitute.

Petitioner was first tried in the Corporation Court of the City of Norfolk, Virginia, on the 26th day of February, 1962, at which time the jury was unable to agree upon a verdict, wheheupon they were discharged. Petitioner was again tried in said Court on 22 March 1962, at which time the Jury found the petitioner guilty as charged and fixed her punishment

at five (5) years imprisonment and a fine of Five Hundred Dollars. ($500.00).

During retrial, City Police Officer, Earl H. Beach, testified that beginning October 21, 1961, he was assigned to keep surveillance of Apartment 103 which apartment had been rented by petitioner and her husband under another name. Police Officer Beach kept the apartment under surveillance from the street on 21 October 1961, and on 23 October 1961, he began a surveillance from the adjoining apartment, Apartment 102. (R.37). In response to a question as to how he could hear from the next apartment, Police Officer Beach, testified as follows at R. 37, 38:

A. Yes, Sir. Some of the time I was in the bathroom. From the medicine cabinet, you could hear part of the conversation there and I had a device that would amplify the sound so that you could hear it in the other room.

Mr. Reid: Spiked Device?

A. Yes, Sir: small device.

Mr. Reid: Object to anyhting he heard with the spiked device and object to his testimony in its entirety unless he could tell what portions that he could hear to with his ear to the medicine cabinet.

Mr. Whitehurst: Your honor, this is also in the next door apartment; listening to what

was going on in the apartment that this defendant forged a name. I suggest this is material for the jury to hear. What he can hear, whether he used a device or had a hearing aid or even put on glasses, this gets to the truth and should come in.

Mr. Reid: On the basis of the spiked device, Your Honor, it is an unreasonable seizure under the 4th Amendment of the Constitution. As such I submit to the Court, it is not admissible. Secondly, the Police Officer testified that part of the conversation he could hear through the medicine cabinet.

Unless he can qualify as to what portion of that he heard through that, I submit his tsetimony should be stricken en toto.

* * *

The Court: Overruled. Exception noted.

Mr. Reid: Save the point, if Your Honor please.

On cross examination, Police Officer Beach, testified further as follows, R.13.

Q. "This spike, was it driven in the wall?

A. It wasn't driven in.

Q. Stuck in the wall?

A. Yes, Sir.

Q. In what portion of the apartment was that?

A. The whole apartment was just one-room efficiency. It would be in the wall that was separating the two apartments."

At the conclusion of trial, trial counsel for petitioner again moved that the evidence of Officer Beach be stricken, R.49, 50.

Mr. Reid: Very well, your Honor. Secondly, I would like to renew my motion, as to striking the evidence of Officer Beach for the purpose that it was irrevelent, immaterial and it had nothing to do with the case before the Court. Also, the evidence of Officer Beach admittedly was obtained, in part, not en toto, by a listening device which was stuck into the wall. According to the decision of the Supreme Court of the United States, it was unlawful as search and seizure. According to the search warrant ,any evidence received from the apartment where that book came from, would be an unlawful seizure. I would like to ask the Court to strike the evidence.

* * *

The Court: "I will let it go to the jury and that's it. I over rule all motions.

Police Officer Beach continued his surveillance of the apartment rented by petitioner by means of the spiked device on 23, 24 and 25 October, 1961. (R. 39, 40 and 41). The surveillance was terminated by a raiding party breaking into the apartment rented by petitioner and there was no evidence of any search warrant. (R. 43, 44 and 45).

Upon grant of a Writ of Error and Supersedeas, the Supreme Court of Appeals of Virginia, affirmed the conviction of Petitioner. The Court distinguished *Silverman* vs. *United States,* 365, U. S. 505, 81 S. Ct. 679, 5 L. Ed. 2d 734, on the grounds that the record showed that there was only a small penetration on the wall by the spiked device and that the record does not show, "That eavesdropping was accomplished through 'an unauthorized physical penetration into the premises' occupied by the defendant. (Appendix Page 11a).

REASONS FOR GRANTING THE WRIT

The increasing incidence of the use of electronic eavesdropping devices by Police Officers coupled with the startling scientific advancements increasing their effectiveness results in a threat to the security of the people in their homes from unreasonable auditory searches by investigating officers and commends the evidentiary problem posed by this case to review by this Court.

1. The decision of the Supreme Court of Appeals of Virginia, the Court below, is squarely in conflict

with the views expressed by this Court in *Silverman* vs. *United States,* 365 U. S. 505. The *Silverman* case presented a factual situation where the investigating officers used a spiked electronic listening device whose spike extended almost one foot and was inserted under the molding of an adjoining row house causing the spike to come in contact with the heating system of the house occupied by the petitioner; thus, the heating system became a giant microphone relaying conversations of the petitioners. In the instant case, the investigating officer testified that he used a "spike device" which was "stuck in the wall" separating the one-room efficiency apartment rented by the petitioner from the one-room efficiency apartment occupied by the Police Officer. The significance and importance of the use of a "spike mike" for eavesdropping in the instant case is set forth in Dash, Knowlton Schwartz, *The Eavesdroppers,* where in its section on "Tools" it said at Page 341:

> **"Where access to the room is impossible, "contact mikes" are available which can pick up sounds through a common wall. The microphone is fastened to the wall with a spike which is driven into the common stud between the rooms, that is, the common column to which the lath or wallboard is fastened. Obviously, there are a few cases where common studding is not used, and in such cases, this type of eavesdropping is impossible."**

Thus, where a "spike mike" is used, there must be contact with a common stud or column connecting

the lath or wallboards of the adjoining rooms. It, in effect, makes the common stud or column a small microphone, through which the investigating officer can hear the conversation of suspected persons in an adjoining apartment. Thus, the investigating officer is picking up voices inside of the protected premises rather than amplifying sounds heard outside of the protected premises. It is submitted that this unauthorized picking up of voices within private premises is the trespass needed to render this an unconstitutional search and seizure. *Cf On Lee* vs. *United States,* 343 U. S. 747, 766-767, 72 S. Ct. 967, 977-978 (Burton J, Dissenting). Admittedly, the "spiked mike" used in the instant case was smaller in size than the "spike mike" used in the *Silverman* Case. Although different in size, it is exactly the same in principal. Therefore, it is submitted that the lower court erred in distinguishing the instant case from *Silverman* on the grounds that there was no showing that, "the eavesdropping was accomplished through an unauthorized physical penetration into the premises occupied by defendant."

In the majority opinion of *Silverman,* the Court said in its final sentence at Page 512:

> **"We find no occasion to re-examine Goldman here but we decline to go beyond it, by even a fraction of an inch."**

In the instant case the "fraction of an inch" beyond *Goldman* is presented to this Court for its decision. This Court is now presented with the oppor-

tunity to demonstrate it means what it said in *Silverman.*

The question of going "a fraction of an inch" beyond *Goldman* where a detectaphone was utilized, is squarely presented here. The evidence that a "spiked mike" was used by being stuck in the wall is uncontradicted. At trial, Counsel objected to the introduction of evidence obtained by use of the "spiked mike" as an unconstitutional search and seizure at the end of trial, counsel moved that the evidence obtained by use of "spiked mike" be stricken as it was obtained by an unconstitutional search and seizure, and the issue of the constitutionality of such evidence was raised by assignment of error to the Supreme Court of Appeals of Virginia and there decided adversely to the petitioner. It is submitted that this Court should now demonstrate to investigating officers, and provide them with the standard, that the use of a "spiked mike" type of listening device is an unconstitutional search and seizure. Ceratinly, this rule applies not only to federal officers under *Silverman* vs. *United States, supra,* but also to State and local police officers by the authority of *Mapp* vs. *Ohio,* 367 U. S. 643, 6 L. Ed (2d) 1081. It is further submitted that this evidenciary rule is drastically needed in view of the recent rapid developments in the fields of electronic eavesdropping and would place all investigating officers on notice, that any evidence obtained by use of a spiked electronic listening device would be inadmissible in the prosecution of a criminal offense as an unconstitutional search and seizure.

2. In the event that this Court should hold that the facts of the instant case do not place it within the ambit of *Silverman* vs. *United States, supra,* and that the instant case is controlled by *Goldman* vs. *United States,* 316 U. S. 129, 62 S. Ct. 993, 86 L. Ed. 1322, it is submitted that *Goldman* vs. *United States, supra,* and the cases determining it should be reviewed as to whether they are sound in relation to the Fourth and Fifth Amendments.

In *Boyd* vs. *United States,* 116 U. S. 616, 630, 6 S. Ct. 524, 532, 29 L. Ed. 746, this Court said:

> **"Breaking into a hosue and opening boxes and drawers are circumstances of aggravation; but any forcible and compulsory extortion of a man's own testimony, or of his private papers to be used as evidence to convict him of crime, or to forfeit his goods, is within the condemnation of that judgement. In this regard the Fourth and Fifth Amendments run almost into each other."**

As set forth by Justice Brennan, in his comprehensive and incisive dissent in *Lopez* vs. *United States,* 83 S. Ct. 1381, at 1397:

> **"The authority of the Boyd decision has never been impeached. Its basic principal that the Fourth and Fifth Amendments interact to create a comprehensive right of privacy, of individual freedom, has been repeatedly approved**

in the decisions of this Court." (see decisions there cited).

And, Justice Brennan, further stated, *supra,* at page 1398:

> **"I think it is demonstrable that Olmstead was erroneously decided, that its authority has been steadily sapped by subsequent decisions of the Court, and that it and the cases following it are sports in our jurisprudence which ought to be eliminated."**

Justice Brennan, in his dissent, succinctly sets forth why *Olmstead* vs. *United States,* 277 U. S. 438, 48 S. Ct. 564, 72 L. Ed. 944, and the cases it controlls including *Goldman* vs. *United States, supra,* should be re-examined to determine their soundness. On this basis, if it is determined that *Goldman* vs. *United States, supra,* controls the instant case, it is submitted that the Court should review and re-examine its holding in the *Goldman* case.

CONCLUSION

For the foregoing reasons, it is respectfully submitted that the Petition for Writ of Certiorari should be granted.

CALVIN H. CHILDRESS
Counsel for Petitioner

APPENDIX.

BLANK PAGE

Present: All the Justices.

CATHERINE CLINTON

-v- Record No. 5558

COMMONWEALTH OF VIRGINIA

OPINION BY JUSTICE HAROLD F. SNEAD

Richmond, Virginia — April 22, 1963

FROM THE CORPORATION COURT
OF THE CITY OF NORFOLK

H. Lawrence Bullock, Judge

Catherine Clinton was indicted on two counts charging (1) that she did feloniously receive money from the earnings of Katherine R. Taylor, who was engaged in prostitution, for a consideration not deemed good and valuable in law in violation of § 18.1-208, Code of 1950, as amended, and (2) that she did unlawfully and feloniously place Katherine R. Taylor in a house of prostitution with intent that she should live a life of prostitution in violation of § 18.1-205. The jury found defendant guilty as charged under the first count and fixed her punishment at 5 years imprisonment and a fine of $500. The trial court overruled defendant's motion to set aside the verdict on the grounds that it was contrary to the law and the evidence and entered judgment in accordance with the verdict. We granted defendant a writ of error.

The defendant did not testify or offer any evidence in her behalf.

The evidence discloses that the defendant and Mrs. Katherine Taylor had been friends for quite awhile, but had not seen each other "in years." In September 1961, pursuant to a telephone call made by defendant to Katherine Taylor the parties met in a restaurant in the city of Norfolk. There they had a "general conversation." They discussed their financial difficulties. Defendant revealed that she had a $1,000 fine to pay and Katherine Taylor said she had unpaid bills. Defendant stated that she had "some numbers that she could contact and we could both make some money"; and that "she had the best clientele in town."

About 10 days later defendant went to Katherine Taylor's home to ascertain if she was still interested in the proposition. Later they toured different sections of the city to locate an apartment, but a location was not decided upon. Subsequently defendant advised her that she had rented an apartment at Ocean View. According to the landlord's desk clerk, defendant, who was accompanied by her husband, Harry Clinton, rented the one-room efficiency apartment at 9630 1st View street in the fictitious name of "Mr. and Mrs. Charles Morrison." Katherine Taylor testified that defendant called "different numbers" to let "the men know that she (defendant) was in business." When asked what her compensation was, she replied that the men paid $10 and that she received $5. Defendant received one-half because she had the "numbers" and

had to pay the telephone bill and the "upkeep of the apartment." With one exception, all of the engagements Katherine Taylor had with men for sexual intercourse secured by defendant were had at the defendant's apartment. Prostitution was not a new experience for Katherine Taylor. She testified that she had formerly worked with defendant in Richmond.

The defendant's apartment was kept under surveillance by Norfolk police officers for four days, during which time they observed men visit the apartment. Part of the time officer Earl H. Beach was stationed in the adjoining apartment where he heard conversations and sounds which tended to show that the premises were used as a house of prostitution. This evidence was obtained by listening through the medicine cabinet in the wall dividing the two apartments and by an amplifying device "stuck in the wall."

On the morning of October 25, 1961, a man, later identified as S. N. Edwards, entered the apartment. The defendant arrived shortly thereafter. About 10 minutes later she and Betty Johnson left the premises and took a seat in Harry Clinton's automobile which was parked across the street in the Colonial Stores' parking lot. The police officers broke the glass in the door of the apartment, entered and found Katherine Taylor and Edwards undressed and preparing for sexual intercourse. They, along with defendant, her husband and Betty Johnson, were taken into custody and the indictment of defendant followed.

Here, defendant argues that the trial court erred (1) in refusing to declare a mistrial for admitting certain evidence of S. N. Edwards which tended to show that she formerly operated a house of prostitution at another place; (2) in admitting evidence obtained in the adjoining apartment through the use of a mechanical listening device stuck in the wall which separated the two apartments; and (3) in refusing Instruction No. D-3. These questions will be discussed in the order mentioned.

S. N. Edwards testified that after a telephone conversation with defendant he went to her apartment. There the conversation between the two was "more or less a sparring deal" as he was attempting to identify himself and show he was not connected with law enforcement. He told her that the purpose of the visit was to meet her and look the place over as he had out-of-town friends who might be interested in contacting her.

On direct examination Edwards testified as follows:

Q. Tell us what actually was said. * * *.

"A. All right; what I said first. I told her that I thought her name was familiar and I asked her if she operated in the other place in town.

"The Court: Operated what? * * *?

"A. Well, a house of prostitution, but those words weren't used. I didn't ask her.

"The Court: What did you use? How did you come to the understanding?

"A. Just what I said, sir, because it was obvious what was going on. It was just a line of conversation and it was taken, well, that both parties knew what was going on.

"She asked me if I had ever visited places down at East Ocean View and I told her I had not and she mentioned some other places, I believe, but I don't recall where it was and I said, no, that I had never visited any other places.

"Then I asked her, to prolong the conversation, if she was ever down at Lynnhaven.

"Mr. Reid: Your Honor, I object to this.

"The Court: Overruled.

Mr. Reid: I save the point.

"A. She says, 'Yes, I did.' I said, 'Well, did you have a young girl working for you that had long hair and wore it up in a pony tail, about five years ago?' Then she mentioned some name which was vague to me because I was just carrying on a conversation and Mrs. Clinton and this Betty were dressing, that is, putting on their hats, getting ready to go out."

The defendant now argues that the Commonwealth was thus allowed to present evidence that five years previously the defendant ran a house of prostitution; and that to compound the error further evidence was allowed tending to show that the defendant had a young girl working for her at that time.

But she made no such objection. Her objection was to the question asked her by Edwards whether "she was ever down at Lynnhaven." She offered no objection at all to the further question asked her by Edwards about a young girl working for her about five years ago, and she made no answer to that question.

Rule 1:8 of the Rules of Court requires that the grounds for objection to the admissibility of evidence be stated with reasonable certainty, and if it does not appear from the record to have been so stated, "such objections will not be considered by this Court except for good cause shown or to enable this Court to attain the ends of justice." Here, counsel for defendant stated no reason for the objection to Edwards' testimony under question at the time it was made and offered no motion to strike such evidence. Counsel merely said "Your Honor, I object to this." After the objection was overruled, counsel stated "I save the point."

Moreover, Katherine Taylor thereafter testified without objection that defendant told her before the apartment was rented "she had the best clientele in town." She stated that defendant during her conversa-

tion with Edwards "described the other place she used to have and was talking about a girl with red hair." On cross-examination she testified that she had "worked with" defendant in Richmond. The time was not designated, but it must have been several years prior to this incident because she had previously stated that she had not seen defendant "in years."

Helen Buckridge said she had only one "paid date" in the apartment for which she received $10 and that she gave defendant one-half of it. At the time she was introduced to defendant, she stated that defendant told her "she needed money and she had a fine to pay and that she was going to start operations again if she could get some girls and get a place." There was no objection made to this testimony. The testimony of Helen Buckridge and Katherine Taylor clearly established that defendant had formerly operated such an illicit business.

Aside from the fact that the grounds for the objection to Edwards' testimony were not stated at the time the objection was made, there has been no good cause shown why the requirement of Rule 1.8, *supra,* should not be applied. The evidence amply supports the conviction of the defendant and it is not necessary to disregard the requirement to state the grounds for obpection with reasonable certainty in order to attain the ends of justice.

Here the Commonwealth was not seeking to prove independent and unconnected crimes in violation of

the settled principle recently stated in *Fleenor* v. *Commonwealth,* 200 Va. 270, 275, 105 S. E. 2d 160. Evidence of other offenses may be admitted only when it shows motive, intent or guilty knowledge, or is connected with or leads up to the offense for which the accused is on trial, *Colvin* v. *Commonwealth,* 147 Va. 663, 669-70, 137 S. E. 476; or when there is only incidental disclosure of other offenses, *Barber* v. *Commonwealth,* 182 Va. 858, 867, 30 S. E. 2d 565. The evidence now claimed to be error came from the defendant in a conversation with Edwards in which the defendant's object, according to Edwards, was "to make sure I wasn't a member of the law or something like that" and, as stated, the only objection she made was to the question of whether she was ever down at Lynnhaven, to which she replied, "Yes, I did."

At the conclusion of the Commonwealth's evidence, defendant moved for a mistrial on the grounds that the testimony of Edwards relating to the former operation of a house of prostitution was prejudicial and improper and that there was no basis for its admission. This motion and others made at the time were overruled.

Whether a motion for a mistrial should be granted or refused rests within the sound discretion of the trial court, and the exercise of this discretion will not be be disturbed unless abused. *Braxton* v. *Commonwealth,* 195 Va. 275, 279, 77 S. E. 2d 840; *Mack* v. *Commonwealth,* 177 Va. 921, 927, 15 S. E. 2d 62; 23A C. J. S., Criminal Law § 1384, pp. 1027, 1028. Such a motion

should be promptly made after a party has full knowledge of the facts and circumstances relied upon. *Crockett* v. *Commonwealth,* 187 Va. 687, 706, 707, 47 S. E. 2d 377.

We find that it was not reversible error for the trial court to admit Edwards' testimony in question, and that the trial court did not abuse its discretion in overruling the motion for a mistrial at the conclusion of the evidence.

The defendant contends that the use by an officer of a mechanical listening device stuck in the partition wall of an adjoining apartment in obtaining evidence constituted an unlawful search and seizure under the Fourth Amendment to the Constitution of the United States and Section 10 of the Constitution of the State of Virginia. Thus, she says that it was reversible error to admit such evidence.

Goldman v. *United States,* 316 U. S. 129, 62 S. Ct. 993, 86 L. Ed. 1322, involved a situation where Federal agents placed a detectaphone against a partition wall and heard conversations between members of a conspiracy. There was no physical invasion of the premises occupied by defendant in obtaining this evidence. The court held that the questioned evidence was not inadmissible on the ground that use of the detectaphone was in violation of the Fourth Amendment.

The defendant relies heavily upon *Silverman* v. *United States,* 365, U. S. 505, 81 S. Ct. 679, 5 L. Ed. 2d 734. There the petitioners were convicted on an in-

dictment charging certain gambling offenses. Police officers were permitted to testify as to incriminating conversations between the petitioners which were overheard through an electronic listening device. This device was described as a microphone with a spike approximately one-foot long attached to it and it also consisted of an amplifier, earphones and a power pack. The officers entered a vacant house and inserted the spike several inches into a crevice of the party wall and made contact with a heating duct which served the adjoining house occupied by the petitioners. Such contact converted petitioners' entire heating system into a conductor of sound and conversations in the house could be heard through the earphones.

In holding that the use of the device violated the Fourth Amendment, the court observed: "* * * For a fair reading of the record in this case shows that the eavesdropping was accomplished by means of an unauthorized physical penetration into the premises occupied by the petitioners. * * *." It pointed out that in the *Goldman* case, *supra,* "the eavesdropping had not been accomplished by means of an unauthorized physical encroachment within a constitutionally protected area," and expressly declined to "re-examine" the case.

The *Silverman* case is factually different from the case at bar and it is not controlling. Officer Beach was asked if the instrument used was a spiked device and he responded "Yes, sir; small device." That is the only description given of it. The uncontradicted evi-

dence is that it was not driven into the wall, but was "stuck in" it. This is the only evidence as to any penetration of the party wall and it is reasonable to assume that the penetration was very slight such as one made by a thumb tack to hold the small device in place. The record does not show that the eavesdropping was accomplished through "an unauthorized physcial penetration into the premises" occupied by defendant. Thus, we hold that the evidence obtained by means of the listening device did not constitute a violation of the Fourth Amendment to the Constitution of the United States or Section 10 of the Constitution of the State of evidence.

Finally, defendant argues that the trial court erred in refusing to grant Instruction No. D-3. It reads:

"The Court instructs the jury that, while they may find a verdict upon the unsupported testimony of an accomplice, such evidence is to be received with great caution, and the Court, in this case, warns the jury of the danger of basing a verdict on the unsupported testimony of an accomplice.

"The Court further instructs the jury that the testimony of an accomplice must be received with great care and caution, and if you believe the testimony of an alleged accomplice was false, and that he was induced to testify falsely either by fear of punishment or hope of reward, you must disregard that testimony in its entirety."

The defendant says that she was entitled to this instruction because there was evidence that Katherine Taylor was an accomplice and no direct corroborating evidence that she received money from Katherine Taylor's earnings as a prostitute, and because Katherine Taylor had hope of reward of receiving a lighter sentence on a conviction for which she had not been sentenced.

As a result of the raid on defendant's premises three misdemeanor charges were placed against Katherine Taylor. At the time of defendant's trial two of the charges had been dismissed and she had been convicted on a plea of guilty to the third charge, but had not been sentenced as the case had been continued for that purpose. Captain Charles D. Grant testified that she had "been promised nothing" by the police.

If Katherine Taylor was not an accomplice, or if the verdict did not rest on her unsupported testimony, then it was not error to refuse the instruction.

"The general test to determine whether or not a witness is an accomplice is to determine whether he could be indicted for the same offense." *Guthrie* v. *Commonwealth,* 171 Va. 461, 469, 198 S. E. 481, and cases there cited.

State of Arizona v. *Green,* 60 Ariz. 63, 131 P. 2d 411, involved a question of whether the prosecuting witness whose earnings defendant was accused of receiving was an accomplice. In holding that the test to be applied

was whether she could be indicted for the same crime, the court stated:

"• • • It is obvious that the prosecuting witness could not have been tried for receiving the earnings of a prostitute from herself. We think, therefore, that she was not an accomplice within the meaning of the statute, • • •." 60 Ariz. at pp. 67, 68, 131 P. 2d at p. 413.

Katherine Taylor, a prosecuting witness, could not have been legally indicted under § 18.1-208 for receiving money from her own earnings as a prostitute for a consideration not deemed good and valuable in law. Such being the case, under the principle enunciated in *Guthrie* v. *Commonwealth, supra,* she was not an accomplice. Moreover, her evidence was not unsupported, and the trial court was correct in refusing Instruction No. D-3.

For the reasons stated the judgment appealed from is

Affirmed.

BLANK
PAGE

FILE COPY

Office-Supreme Court, U.S.
FILED
NOV 14 1963
JOHN F. DAVIS, CLERK

In the

Supreme Court of the United States

October Term, 1963

No. 294

CATHERINE CLINTON,

Petitioner

v.

COMMONWEALTH OF VIRGINIA,

Respondent

RESPONSE TO THE PETITION FOR A WRIT OF CERTIORARI

ROBERT Y. BUTTON
Attorney General of Virginia

D. GARDINER TYLER
Assistant Attorney General

Supreme Court–State Library Building
Richmond 19, Virginia

BLANK
PAGE

TABLE OF CONTENTS

	Page
Opinion Below	1
Question Presented	1
Constitutional Provisions Allegedly Involved	2
Statement of the Case	2
Argument	10
I. Unauthorized Physical Penetration Into Premises Necessary to Bring About the Application of the Fourth Amendment	10
II. Guilt of the Petitioner Established by Other Evidence Than the Conversations Heard by Officer Beach Through the Microphone	18
III. Conduct of Police Officers Did Not Constitute Unreasonable Search and Seizure in Violation of the Fourth Amendment to the Constitution of the United States	20
Conclusion	26

TABLE OF CITATIONS

Cases

Bompensiero v. Superior Court of San Diego County, 44 Cal. (2d) 178, 281 P. (2d) 250 (1955) 24

Brinegar v. United States, 338 U. S. 160 ..... 22, 24

Byrd v. Commonwealth, 158 Va. 897, 900 23

Carroll v. United States, 267 U. S. 132, 162, 69 L. Ed. 543, 555, 45 S. Ct. 280, 39 A. L. R. 790 (1925) 24

Page

Clinton v. Commonwealth, 204 Va. 275, 130 S. E. (2d) 437 1

Crawford v. United States (Va.), 160 F. (2d) 629 26

Goldman v. United States, 316 U. S. 129, 62 S. Ct. 933, 86 L. Ed. 1322 ..... 13, 14, 16, 17, 19, 27

Irvine v. California, 347 U. S. 128 17

Ker v. California, 83 S. Ct. 1623, 10 L. Ed. 726, 728, 373 U. S. 23 ..... 19, 21, 22, 23, 24, 26, 27

Lopez v. United States, 83 S. Ct. 1381 17

Mapp v. Ohio, 367 U. S. 643, 6 L. Ed. (2d) 1081 (June, 1961) 21, 27

Morrison v. United States, 262 F. (2d) 449 (1958) 25

N. & W. Ry. Co. v. Haun, 167 Va. 157, 164 23

People v. Cahan, 44 Cal. (2d) 434, 282 P. (2d) 905 20

People v. Fischer, 49 Cal. (2d) 442, 317 P. (2d) 967 (1957) 24

People v. Tarantino, 290 P. (2d) 505 20

Pierce v. Louisiana, 306 U. S. 354 21

Seawell v. U. S., 243 F. (2d) 909 25

Silverman v. United States, 365 U. S. 505, 5 L. Ed. (2d) 734 .. 13, 14 17, 19, 27

Spano v. New York, 360 U. S. 315 21

Thomas v. Arizona, 356 U. S. 390 21

United States v. Goldman, 118 F. (2d) 310, 314 15

United States v. Irby, 304 F. (2d) 280 26

Williams v. United States, 263 F. (2d) 487, 488 24

Wolf v. Colorado, 338 U. S. 325 27

Statutes

Page

Code of Virginia (1950) as amended:

Section 18.1-205 2

Section 18.1-208 2

Constitution of Virginia:

Section 10 20

Constitution of the United States:

Fourth Amendment 20, 21

BLANK
PAGE

In the

Supreme Court of the United States

October Term, 1963

No. 294

CATHERINE CLINTON,

Petitioner

v.

COMMONWEALTH OF VIRGINIA,

Respondent

RESPONSE TO THE PETITION FOR A WRIT OF CERTIORARI

OPINION BELOW

The conviction of the petitioner (hereinafter sometimes referred to as defendant) was affirmed by the Supreme Court of Appeals of Virginia, as shown by the opinion of that Court reported in the case of *Clinton* v. *Commonwealth*, 204 Va. 275, 130 S. E. (2d) 437. The judgment was entered on April 22, 1963.

QUESTION PRESENTED

Whether the conviction in a State Court should be reversed by this Honorable Court, where an indeterminable portion of the evidence (conversations) relative to the ob-

servations of a police officer was secured by the use of a microphone stuck (placed against) on a wall of an apartment adjoining the apartment rented by the petitioner and her husband under false names and where she placed a certain female to live the life of a prostitute.

CONSTITUTIONAL PROVISIONS ALLEGEDLY INVOLVED

The petitioner contends that the provisions of the Fourth and Fifth Amendments to the Constitution of the United States have been violated.

The respondent denies this.

STATEMENT OF THE CASE

The petitioner was found guilty under a two count indictment of the violation of:

(1) Section 18.1-208, Code of Virginia (1950) as amended, knowingly receiving money from the earnings of a female engaged in prostitution; and

(2) Section 18.1-205 of said Code, unlawfully placing a female in a house of prostitution with the intent that she should live the life of a prostitute.

The convictions were rendered in the Corporation Court of the City of Norfolk on February 26, 1962. There was no opinion rendered by the Judge of that Court and there is no requirement that the trial court makes specific findings and render opinions.

As the petitioner apparently takes the position that the conversations of the occupants of Apartment 103 (rented to the petitioner and her husband) which were overheard by Officer Beach by means of a microphone were essential to the establishment of the Commonwealth's case, it is well to point out that this is not correct. The testimony of

Katherine Taylor, Helen Buckridge and S. N. Edwards independently from that of Officer Beach established the guilt of the petitioner.

The fact that the petitioner had given a false name in registering or in renting the apartment (No. 103) led to suspicion by the police authorities that there may be something wrong about her activities. These suspicions were heightened after the surveillance undertaken by Officer Beach on October 21, 1961, from a point on the street, which indicated a heavy traffic of males and females entering the apartment. Again, on October 23, 1961, the surveillance of the apartment was continued, this time from the adjoining apartment (No. 102). Surveillance from this point continued on October 24 and 26, the petitioner being arrested on the latter date.

The following is a resume of the evidence taken from the record as summarized by counsel for respondent:

> The defendant, Catherine Clinton, on several occasions talked to Katherine Taylor and Helen Buckridge about working for her as prostitutes. The two women agreed to work as prostitutes for the defendant; they were to pay the defendant one-half of what they took in as the defendant would furnish the apartment and the customers.
>
> The defendant and her husband, Harley Clinton, posed as Mr. and Mrs. Charles Morrison and during October 1961 rented the apartment at 9630 First View Street, Norfolk, Virginia, for the purpose of prostitution. The defendant forged the name of Mr. and Mrs. Charles Morrison on the registration slip and made the rent payments (Pages 9, 10). Katherine Taylor and Helen Buckridge both worked in the defendant's apartment as prostitutes and gave one-half of their earnings to the defendant for furnishing the apartment and the customers.

Officer Earl H. Beach of the Norfolk Police Division and fellow police officers were able to keep surveillance on the apartment for several days by being in the adjoining apartment they were able to observe many male visitors to the defendant's apartment who remained for a short time. Officer Beach heard much of the conversation and activity that took place in the defendant's apartment by listening through a medicine cabinet in the adjoining wall. He also used a device that would amplify sounds and also used this device on the adjoining wall, it did not penetrate the defendant's wall. Officer Beach was able to hear the defendant making various arrangements concerning the operation of her house of prostitution. Officer Beach was able to see every one who entered and left the defendant's apartment. He was also able to hear everything that took place within the apartment.

Mr. S. N. Edwards went to the apartment as a customer on October 25, 1961. The defendant was there along with Katherine Taylor and Betty Johnson. The defendant questioned Edwards closely as to where he got the telephone number and who he was. After her interrogation of Edwards the defendant left with the Johnson woman and said that she was going to look for a larger place. The defendant actually went across the street to the parking lot and got into an automobile with her husband and waited.

At this point the police entered the apartment, both Katherine Taylor and Edwards were undressed and preparing to have sexual relations with each other. The police entered the apartment without a warrant as they had reasonable grounds to believe that a felony and a misdemeanor were being committed in their presence.

The following excerpts from the testimony of Officer Beach embrace the only description of the hearing device and how it was used:

"MR. WHITEHURST:

"Q. Answer how you could hear from the apartment.

"A. Yes, sir. Some of the time I was in the bathroom. From the medicine cabinet, you could hear part of the conversation there and I had a device that would amplify the sounds so that you could hear it in the other room.

"MR. REID: Spiked device?

"A. Yes, sir; small device."

* * *

"Q. This spike, was it driven in the wall?

"A. It wasn't driven in.

"Q. Stuck in the wall?

"A. Yes, sir.

"Q. In what portion of the apartment was that?

"A. The whole apartment was just one-room efficiency. It would be the wall that was separating the two apartments.

"Q. Was it in the center of the wall, the back of the wall, or what?

"A. No, sir. It would be closer to the front of the house. It would be a little off from the center of the wall."

The record does not disclose a breakdown of the portion of the conversations Officer Beach picked up by means of the hearing device and the portion that he heard through his natural sense of hearing, but the Officer did state definitely that he heard the conversation of the man and woman in the bathroom through the medicine cabinet in his apartment (R. 42, 43).

Omitting the conversations related by Officer Beach, the following is a chronological resume of his testimony (exclusive of the conversations heard):

OCTOBER 21, 1961

1. At 11:10 a.m. a man in a Ford car parked on the Colonial Store lot and looked at No. 9630 First View Street.

2. At approximately the same time a woman, later identified as the defendant, came to the window and waved to the man in the car. The man was later identified as defendant's husband.

3. At 11:35 p.m. (a.m) a white female (identified as Catherine Taylor) went into 9630 First View Street.

4. At 11:30 a.m. a white male went up to 9630 First View Street.

5. At 1:30 p.m. this man came out [of the apartment].

6. At 12 Noon a white female came out 9630 First View Street and went a half block up the street to a bar. She was identified as Betty Johnson.

7. At 1:30 p.m. a white female (the defendant) came out the apartment and got into an automobile bearing a Virginia license.

8. At 2:15 p.m. Harry Clinton, the defendant's husband, came back and parked his car on the lot and went into the apartment.

9. At 3 p.m. a white male came out the apartment, got into a car and left.

10. At 3:25 p.m. a white male (identified as Harry Clinton, the defendant's husband) came out the apartment, proceeded to the parking lot and got into his car and sat there.

11. At 3:40 p.m. a white female (the defendant) came out the apartment and left with her husband.

OCTOBER 23, 1961

Officer Beach conducted his operations on that date in and from Apartment 102, which apartment adjoined 103.

1. At 1:00 p.m. the phone rang, which was answered.

2. At 1:20 p.m. the phone rang again and was answered by a woman.

3. At approximately 2:00 p.m. a white male entered the apartment.

4. At 3:00 p.m. this same man left.

5. At 3:05 p.m. the defendant arrived and entered the apartment.

6. The telephone rang at 3:18 p.m. and again at 3:30 p.m.

7. At 4:25 p.m. a white male came up and, after ringing the door bell to Apartment 103, entered the same.

8. After conversing with the defendant this man left.

9. When this man departed, the defendant came out the apartment and stood on the ramp and looked to the north and to the south and returned to the apartment.

OCTOBER 24, 1961

1. Officer Beach arrived at Apartment No. 102 at 1:07 p.m. He heard shoes fall to the floor and movements on the daybed.

2. At 1:16 p.m. a man and a woman (Apartment 103) went into the bathroom. The officers ascertained this by placing his ear upon the medicine cabinet in the bathroom of Apartment No. 102.

3. At 1:27 p.m. a white man left the apartment.

4. At 1:35 p.m. a white female (identified as Catherine Taylor) left the apartment.

5. At 2:25 p.m. the defendant arrived and entered the apartment. A conversation between the defendant and one of the women in the apartment ensued.

6. At 2:28 p.m. the phone rang.

7. At 2:37 p.m. a girl identified as Betty Johnson came out the apartment and met the defendant's husband, Harry Clinton—obtained a package from him and brought the package to the apartment.

8. At 2:44 p.m. the telephone rang in the apartment and was answered [by the defendant].

9. At 3:27 p.m. the phone rang again and was answered [by the defendant].

10. At 3:30 p.m. the phone rang again and was answered [by the defendant].

11. At 3:40 p.m. Harry Clinton, the defendant's husband entered the apartment.

12. At 3:49 p.m. the phone rang and was again answered [by the defendant].

13. At 4:00 p.m. the phone rang again and was answered [by the defendant].

14. At 4:07 p.m. the defendant and her husband, Harry Clinton, left the apartment together.

OCTOBER 26, 1961
(Observations made from Apartment 103)

1. At 10:34 a.m. a white male entered the defendant's apartment.

2. At 10:45 a.m.—"you could hear a man and woman up against the wall where the sofa was" and "all you could hear was springs in the daybed squeak."

3. At 10:54 a.m. a man arrived [entered the apartment].

4. At 11:25 a.m. another man arrived at the apartment (later identified as Mr. Edwards).

5. At 11:26 a.m. the defendant arrived and remained five or ten minutes.

6. The defendant left the apartment with Betty Johnson and proceeded to the parking lot where they were arrested by Officer Beach together with Harry Clinton.

All of the above was observed by Officer Beach through his natural senses of sight and hearing. It is submitted that these facts ascertained by him and the knowledge that the apartment was rented by the defendant and her husband under an assumed name constituted probable cause that a misdemeanor was being committed in the petitioner's apartment and thereby justified the officers in entering the same and making the arrest of the occupants thereof found in an undressed condition preparing or engaging in sexual relationship.

ARGUMENT

I.

Unauthorized Physical Penetration Into Premises Necessary To Bring About the Application of the Fourth Amendment

The petitioner argues on pages 7, 8, 9 and 10 of her brief that there was a physical penetration into the premises occupied by her. The evidence in this case does not bear out this contention. The hearing device used by the officer was not described to any extent. The petitioner assumes that the spike on the device was driven into the wall to the extent that an unlawful trespass was effected. She also assumes that the spike was driven into the common studding to which the wall boards were fastened. There is no evidence of this whatsoever in the record. The evidence does not disclose the character of the wall, whether it was solid or made of common studding.

Petitioner seeks to establish the erroneous assumption that the spike attached to the microphone was driven into the common studding from a quotation (on page 3 of her brief) from the work of Dash, Knowlton, Schwartz, "The Eavesdroppers," in its section on tools, page 341, the inference being that the so-called "spike mike" could not pick up the sounds unless same was driven into the common studding between the wall of the petitioner's apartment and the apartment occupied by Officer Beach and therefore the spike attached to the microphone was actually driven into the common studding. The following correspondence with Dr. Richard F. Schwartz disproves this assumption:

"October 29, 1963

"Dr. Richard F. Schwartz
"Assistant Professor
"Moore School of Electrical Engineering
"University of Pennsylvania
"Philadelphia 4, Pennsylvania

"Dear Dr. Schwartz:

"The writer has examined with great interest the work entitled 'The Eavesdroppers' of which you are a co-author. This office is interested in a case involving the use of electronic equipment where the premises of the defendant were invaded by officers after information was obtained through a hearing device commonly known as a spiked mike which was 'stuck' on a wall. On page 341 of your book you describe the use of 'contact mikes' and state that their use is limited to where the spike is driven into the common column to which the lathe or wall board is fastened. In your work you do not describe the so-called detectophone which the writer understands is leaned against the wall and can detect a conversation carried on in a adjoining room. Is there any difference between this and the spiked mike where the spike is not driven into the common studding?

"With high regards and best wishes, I am

"Sincerely yours,

"/s/ D. Gardiner Tyler
"Assistant Attorney General"

DGT:MVH

"31 October 1963

"Mr. D. Gardiner Tyler
"Assistant Attorney General
"Commonwealth of Virginia
"Office of Attorney General
"Richmond, Virginia

"Dear Mr. Tyler:

"This is in reference to your letter of 29 October 1963 concerning eavesdropping with a concealed microphone.

"I have heard the term 'detectophone,' but I do not personally know how it is similar to or different from other types of wall microphones. The main point I was making in my work of several years back was that the presence of a 'dead' air space between walls might hinder the transmission of sound to a microphone located on the side opposite to the source of sound. It is impossible to say that this would always prohibit any sound transmission. Nevertheless, the 'cushioning' of an air pocket would be largely negated if common studding were used. If a situation did exist where a spiked microphone was ineffective, it is very likely that any other type microphone would be equally ineffective.

"I trust this answers your question. If there is any other way I may help you, please do not hesitate to write.

"Very truly yours,

"/s/ Richard F. Schwartz
"Associate Professor of
"Electrical Engineering"

RFS:sbb

The Virginia Supreme Court of Appeals concluded that "the record does not show that the eavesdropping was accomplished through 'an unauthorized physical penetration of the premises occupied by the defendant.'" The decision of the Virginia Court is not in conflict with the views expressed by this Court in *Silverman* v. *United States*, 365 U. S. 505, 5 L. Ed. (2d) 734, but is in accordance therewith. In that case, the evidence clearly showed that the spike attached to the microphone penetrated the party wall sufficiently to make contact with "a heating duct servicing the house occupied by the petitioner thus converting their entire heating system into a conductor of sound." It is manifest from the concurring opinion of Mr. Justice Clark and Mr. Justice Wittaker (305 U. S. 513) that the decision in *Silverman* is based on the premise that there was in fact "an unauthorized physical penetration into petitioner's premises." The majority opinion is of the same purport:

> "It [the decision] is based upon the reality of an actual intrusion into the constitutionally protected area." (365 U. S. 512)

The word "intrusion" is defined by Webster's International Dictionary as follows:

> "*Law.* The entry of a stranger, after a particular estate or freehold is determined, before the person who holds in remedial or reversion has taken possession; hence, the act of lawfully entering upon, seizing or taking possession of, the property of another, as in trespassing upon crown lands, in the usurpation of an office."

In the case of *Goldman* v. *United States*, 316 U. S. 129, 62 S. Ct. 933, 86 L. Ed. 1322, the Court held that placing

a detectophone against an office wall in order to listen to conversations taking place in the office next door did not violate the Fourth Amendment. There, as here, in the case at bar, there was no physical encroachment within the constitutionality protected area. The device used in the case at bar was more akin to the detectophone than the so-called "spiked mike" used in the *Silverman* case. The Court, in that case, refused to re-examine the *Goldman* case but pointed out whether or not there was a physical invasion of the defendant's premises is the vital factor in determining the validity of the evidence thereby secured. If there is an unlawful physical invasion of the defendant's premises in order to obtain the evidence, then the Fourth Amendment is violated; otherwise not. The Court, in the *Silverman* case, makes clear the distinction between the two cases. We quote from its opinion (365 U. S. 510):

> "The absence of a physical invasion of the petitioner's premises was also a vital factor in the Court's decision in Olmstead v. United States, 277 U. S. 438, 72 L. ed. 944, 48 S. Ct. 564, 66 A.L.R. 376. In holding that the wire-tapping there did not violate the Fourth Amendment, the Court noted that '[t]he insertions were made without trespass upon any property of the defendants. They were made in the basement of the large office building. The taps from house lines were made in the streets near the houses.' 277 U.S., at 457. 'There was no entry of the houses or offices of the defendants.' 277 U.S., at 464. Relying upon these circumstances, the Court reasoned that '[t]he intervening wires are not part of [the defendant's] house or office any more than are the highways along which they are stretched.' 277 U.S. at 465.
>
> "Here, by contrast, the officers overheard the petitioners' conversations only by usurping part of the

petitioners' house or office—a heating system which was an integral part of the premises occupied by the petitioners, a usurpation that was effected without their knowledge and without their consent."

In the case of *United States* v. *Goldman,* 118 F. (2d) 310, 314, the Court aptly stated:

"Nor was any error committed in denying Schulman's motion, in which the Goldman's did not join, to suppress the evidence obtained by government agents by the use of the detectaphone and allowing it to be introduced at the trial. Nothing was obtained as a result of any secret entry of Schulman's office. No trespass upon his premises in any way helped to obtain the evidence. The situation was legally no different from the use of an amplifier of sound to overhear conversation not otherwise audible to the listener as for instance, the use of a common aid to hearing by a person somewhat deaf. No communication by wire or radio was intercepted to make applicable the provisions of Sec. 605 of the Communications Act of 1934, c. 652, 48 Stat. 1046, 1103, 47 U.S.C.A. §605, as construed in Nardone v. United States, 308 U.S. 338, 60 S. Ct. 266, 84 L.Ed. 307. There was only an instance of eavesdropping which alone, though an invasion of privacy, is not a violation of a recognized legal right to privacy. Conspirators who discuss their unlawful schemes must take the risk of being overheard and the risk of having what is overheard used against them provided there is otherwise no trespass by the listener or violation of a statutory right to use a means of communication thus made immune from interception. Olmstead v. United States, 277 U.S. 438, 48 S.Ct. 564, 72 L.Ed. 944, 66 A.L.R. 376. Compare, United States v. Feldman, 3 Cir., 104 F.2d 255; and Smith v. United States, 4 Cir., 2 F.2d 715."

In affirming the judgment of the lower court in the case of *Goldman* v. *United States,* 316 U. S. 129, 135, in passing on the question of whether the use of the detectaphone by Government agents was in violation of the Fourth Amendment, the Court stated:

> "We hold that the use of the detectaphone by Government agents was not a violation of the Fourth Amendment.
>
> "In asking us to hold that the information obtained was obtained in violation of the Fourth Amendment, and that its use at the trial was, therefore, banned by the Amendment, the petitioners recognize that they must reckon with our decision in Olmstead v. United States, 277 US 438, 72 L ed 944, 48 S Ct 564, 66 ALR 376. They argue that the case may be distinguished. The suggested ground of distinction is that the Olmstead Case dealt with the tapping of telephone wires, and the court adverted to the fact that, in using a telephone, the speaker projects his voice beyond the confines of his home or office and, therefore, assumes the risk that his message may be intercepted. It is urged that where, as in the present case, one talks in his own office, and intends his conversation to be confined within the four walls of the room, he does not intend his voice shall go beyond those walls and it is not to be assumed he takes the risk of someone's use of a delicate detector in the next room. We think, however, the distinction is too nice for practical application of the constitutional guaranty and no reasonable or logical distinction can be drawn between what federal agents did in the present case and state officers did in the Olmstead Case.
>
> "The petitioners ask us, if we are unable to distinguish Olmstead v. United States, to overrule it. This we are unwilling to do."

To say that the use of electronic devices which enable a listener to pick up conversations emanating from adjoining

property where there is no physical pentration of the premises (a trespass) occupied by those conversing should be prohibited is not sound. In drawing the line in the *Goldman* and *Silverman* cases, *supra*, as this Court has done, refusing to impose the exclusionary rule where there is no actual physical penetration, is sensible and logical.

Surely, the officer [occupant of the adjoining apartment] violates no law or constitutional provision when he listens with his own ears to conversations emanating from the other room or apartment and using what he hears as evidence in a criminal prosecution. Does he violate the law if he places his ear against the wall of his own apartment? Does he violate the law if he wears a hearing aid? Does he violate the law if he places a microphone against the wall of his own apartment? Does he violate the law when he sticks this microphone on the wall of his own apartment? Does an officer violate the law by observing the activities of persons from a point outside the physical limits of the property of those persons? Does an officer violate the law if he uses a flashlight (electronic device) to aid him in making such observations? To ask these questions is to answer them. If the evidence collected in such ways cannot be used in criminal prosecutions, then the enforcement of criminal law in this country will be severey handicapped.

This is not a case where the microphone was placed in the petitioner's apartment as was condemned in the case of *Irvine* v. *California*, 347 U. S. 128, although this Court did in fact affirm the conviction in that instance. Petitioner relies on the dissenting opinion in the recent case of *Lopez* v. *United States*, 83 S. Ct. 1381, for a basis for this Court to reverse the holding of the *Goldman* case, *supra*. The *Lopez* case has little or no relevance to the *Goldman* case.

The factual situation is different. This Court did permit the recordings of a conversation to be considered in evidence. The recordings were taken down by a tiny wire recorder lodged in the pocket of the detective while he conversed with Lopez in Lopez' private office. The only similarity with the case at bar is that in both cases there was no trespass or unauthorized physical penetration of the defendant's premises, and an electronic device was used. In one case (the case at bar) to amplify the sounds (conversations) and the others (Lopez) to record the conversations.

> "Conspirators who discuss their unlawful schemes must take the risk of being overheard and the risk of having what is overheard used against them provided there is otherwise no trespass by the listener. . . ." (118 F. (2d) 310)

A person who discusses her arrangements concerning the operation of a house of prostitution contrary to the laws of Virginia must take the risk of being overheard and the risk of what is overheard used against her in a criminal prosecution.

II.

Guilt of the Petitioner Established by Other Evidence Than the Conversations Heard by Officer Beach Through the Microphone

We have heretofore narrated the evidence which Officer Beach observed through his natural senses of hearing and sight. Such was sufficient to make him believe that a crime was being committed in the adjoining apartment and thus establishes probable cause to enter the adjoining apartment without a search warrant. This evidence, independently of the conversations picked up by the officers in using the microphone and the testimony of Edwards, Taylor and Helen Buckridge, all of whom testified on behalf of the

Commonwealth, was sufficient to establish the guilt of the petitioner beyond a reasonable doubt. In both the *Silverman* and *Goldman* cases, the conversations heard by the officers were essential as evidence to establish the guilt of the accused. In other words, the case for the prosecution depended upon such evidence. Here the situation is entirely different. The evidence which petitioner sought to have the Court exclude was not necessary to the establishment of the guilt of the accused.

In affirming the judgment of the lower court, the Supreme Court of Appeals of Virginia determined that the evidence was sufficient to sustain the guilt of the accused, although this particular contention was not stressed by the petitioner before that court. This Court has held that it must examine for itself the facts and findings and the record to determine whether or not the constitutional rights of an appellant have been violated. *Ker* v. *California,* 83 S. Ct. 1623, 10 L. Ed. 726, 728, 374 U. S. 23. The only error asserted by the petitioner in this Court is the failure of the trial court to exclude the testimony of Officer Beach.

If this Court will disregard the entire testimony of Officer Beach and examine the testimony of Catherine Taylor (R. 16, 27) and of Helen Buckridge (R. 28, 33) it will see that this evidence convincingly and overwhelmingly establishes the guilt of the petitioner of COUNT ONE of the Indictment (violation of Section 18.1, Code of Virginia (1950), as amended) receiving money from the earnings of a prostitute.

If the Court will disregard the entire testimony of Officer Beach and examine the testimony of Porter (R. 9, 10), of Edwards (R. 11, 16), of Catherine Taylor (R. 16, 27) and of Helen Buckridge (R. 28, 33), it will see that this evidence convincingly and overwhelmingly establishes the guilt of the petitioner of COUNT TWO of the Indictment of the violation of Section 18.1-205, Code of Virginia (1950) as amended—placing a female in a house of prostitution.

In the case of *People* v. *Tarantino,* 290 P. (2d) 505 (Cal.), evidence was obtained by the use of a microphone hidden in the defendant's office by the police. The California Supreme Court had ruled shortly before in *People* v. *Cahan,* 44 Cal. (2d) 434, 282 P. (2d) 905 (1955), that such evidence could not be used. The prosecution contended that the admission of the evidence did not result in a miscarriage of justice, there being sufficient evidence independent of that obtained through the means of the microphone. In passing on this point, the Court stated:

> "As to Count 2 it appears to us that the evidence, entirely independent of that illegally obtained, convincingly, if not overwhelmingly, establishes guilt, and, for the reasons hereinafter more particularly stated, we conclude that the verdict on this count should not be disturbed."

III.

Conduct of Police Officers Did Not Constitute Unreasonable Search and Seizure in Violation of the Fourth Amendment to the Constitution of the United States.

Section 10 of the Virginia Constitution is as follows:

> "That general warrants, whereby an officer or messenger may be commanded to search suspected places without evidence of a fact committed, or to seize any person or persons not named, or whose offense is not particularly described and supported by evidence, are grievous and oppressive, and ought not to be granted."

The Fourth Amendment to the United States Constitution is as follows:

> "The right of the people to be secure in their persons, houses, papers, and effects, against *unreasonable*

searches and seizures, shall not be violated, and no warrants shall issue, but upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized." (Italics supplied)

As the privacy of an individual and the sanctity of his home is one of the fundamental bulwarks upon which this Republic was founded, we find that the courts have decided literally hundreds and hundreds of cases involving this subject. Until the decision of the Supreme Court, in the case of *Mapp* v. *Ohio,* 367 U. S. 643, 6 L. Ed. (2d) 1081 (June, 1961), the courts of Virginia were not primarily concerned with the legality of the search and seizure as a prerequisite of receiving evidence procured as a result thereof. However, now it is essential that the courts determine from the circumstances surrounding the search and seizure with or without a warrant whether the same was legal.

As this Court has held in cases involving constitutional rights, an independent examination will be made so the Court can determine for itself whether the Constitution has been violated. We have heretofore in this response quoted at length from the record and summarized the evidence in connection with the circumstances leading up to the arrest of the petitioner and the entry of the police officers into her apartment where they arrested a man and a woman prepared for sexual intercourse. *Ker* v. *California, supra; Spano* v. *New York,* 360 U. S. 315; *Thomas* v. *Arizona,* 356 U. S. 390; *Pierce* v. *Louisiana,* 306 U. S. 354. As the record discloses, no objection was made by the petitioner to the introduction of the testimony of S. N. Edwards (R. 15) and of Katherine Taylor (R. 23) which embraced the activities taking place in the apartment when the officers entered. Although Captain Grant and Ser-

geant Pugh of the Norfolk Police Department actually entered the apartment and apparently arrested Edwards and Catherine Taylor, neither testified as to what they observed in the apartment (R. 46, 47). Captain Grant who with other officers handled the investigation was not asked whether he had a search warrant. Officer Beach, who arrested the petitioner immediately after she had left the apartment, did not have a warrant to make the arrest. He stated that he did not know of anyone having a search warrant (R. 44). He did state, however, that he heard the officers knock on the door of the apartment and say "Police officers. Open the door" (R. 44). As Captain Grant handled the investigation with other officers (R. 46), it is reasonable to assume that the fact and circumstances disclosed by the surveillance made by Officer Beach were transmitted to him "that this information was hearsay does not destroy its role in establishing probable cause." *Ker* v. *California, supra. Brinegar* v. *United States,* 338 U. S. 160.

The arrests made by Officer Beach, Captain Grant and Sergeant Pugh were lawful. There is no requirement in the Fourth Amendment or elsewhere in the Federal Constitution that there must be a search warrant before there can be a lawful search or seizure. True, a search warrant is good evidence that probable cause exists, but same is not conclusive. Where the facts indicate the search warrant was issued without probable cause, courts will hold that the search is in violation of the constitutional prohibition. This is certainly true in Virginia. Considering all the facts and circumstances surrounding this case, how could it be said that the search was unreasonable?

As the officers had probable cause to believe that a house of prostitution was being maintained in the said apartment, they had a right to arrest and make the search because they

had probable cause that a felony had been committed or was being committed. The law in Virginia is clear on this subject. After quoting many authorities, in the case of *Byrd* v. *Commonwealth*, 158 Va. 897, 900, the Court stated (p. 902):

> "From this it appears that an arrest without a warrant is lawful, (1) where a felony has been committed, (2) where it is being committed, (3) when it is about to be committed, (4) when a misdemeanor is committed in the presence of an officer, and (5) where a breach of the peace is imminent."

Likewise, this Court, in the case of *N. & W. Ry. Co.* v. *Haun*, 167 Va. 157, 164, stated:

> "It is the duty of a police officer to make an arrest, without a warrant, for a misdemeanor committed in his presence."

A search incident to a lawful arrest is valid. The arrests were lawful in this case as the felony had been committed or was being committed.

In this respect, the separate opinion issued in the case of *Ker* v. *California*, *supra*, should be considered (10 L. Ed. (2d) 726, 739):

> "The evidence at issue, in order to be admissible, must be the product of a search incident to a lawful arrest, since the officers had no search warrant. The lawfulness of the arrest without warrant in turn, must be based upon probable cause, which exists 'where "the facts and circumstances within their [the officers'] knowledge and of which they had reasonably trustworthy information [are] sufficient in themselves to

warrant a man of reasonable caution in the belief that" an offense has been or is being committed.' *Brinegar* v. *United States*, 338 U. S. 160, 175, 176, 93 L. ed. 1879, 1890, 69 S. Ct. 1302 (1949), quoting from *Carroll* v. *United States*, 267 U. S. 132, 162, 69 L. ed. 543, 555, 45 S. Ct. 280, 39 ALR 790 (1925); accord, *People* v. *Fischer*, 49 Cal. (2d) 442, 317 P. (2d) 967 (1957); *Bompensiero* v. *Superior Court of San Diego County*, 44 Cal. (2d) 178, 281 P. (2d) 250 (1955)."

A search without a warrant is lawful. Again referring to the separate opinion in the *Ker case* (10 L. Ed. 726, 742), we find this statement:

"The doctrine that a search without warrant may be lawfully conducted if incident to a lawful arrest has long been recognized as consistent with the Fourth Amendment's protection against unreasonable searches and seizures. See Marron v United States, 275 US 192, 72 L ed 231, 48 S Ct 74 (1927); Harris v United States, 331 US 145, 91 L ed 1399, 67 S Ct 1098 (1947); Abel v United States, 362 US 217, 4 L ed 2d 668, 80 S Ct 683 (1960); Kaplan, Search and Seizure: A No-Man's Land in the Criminal Law, 49 Cal L Rev 474, 490-493 (1961). The cases have imposed no requirement that the arrest be under authority of an arrest warrant, but only that it be lawful. See Marron v United States, supra (275 US at 198, 199); United States v Rabinowitz, supra (339 US at 61); cf. Agnello v United States, 269 US 20, 30, 31, 70 L ed 145, 148, 46 S Ct 4, 51 ALR 409 (1925)."

In *Williams* v. *United States*, 263 F. (2d) 487, 488, the Court stated:

"The Fourth Amendment prohibits unreasonable search. A search is unreasonable unless authorized by a valid search warrant, is incident to a valid arrest, or

is made in exceptional circumstances which dispense with the need for a search warrant." (Cases cited)

In the case of *Morrison* v. *United States*, 262 F. (2d) 449 (1958), the search of the house of the accused was made about two hours after the commission of the alleged crime. Judge Prettyman, speaking for the Court, stated:

> "Without attempting to sort out the precise critical factor in each one of the great welter of decided cases, let us come directly to the point. The *necessities of the moment* make the difference between legal and illegal entries in the cases included within our question. For example, in Smith v. United States (103 U. S. App. D. C. 48, 254 F. (2d), 751 (D. C. Cir., 1958), certiorari denied 357 U. S. 937, 78 S. Ct. 1388, 2 L. Ed. 2d 1552 (1958)), a typical narcotics case, the officers sent an informer into a house with marked money, and he returned in a few moments with narcotics but no money. To postpone arrest until a warrant could be sought would, under those circumstances, probably allow the fruits of the crime and contraband to be destroyed. The officers well knew this. We there sustained the entry without a warrant to make an arrest. But no such circumstances existed in the present case." (Italics supplied)

In the case of *Seowell* v. *United States*, 243 F. 2d 909, the Court, on page 912, stated:

> "In the absence of an applicable federal statute the law of the state where an arrest without warrant takes place determines its validity, United States v. Di Re, 332 U.S. 581, 589, 68 S.Ct. 222, 92 L.Ed. 210; and in Virginia the general rule prevails that reasonable or probable cause is essential to the validity of such an arrest. United States v. Cotter, D.C.E.D.Va., 80 F. Supp. 590, 592."

In the case of *United States* v. *Irby*, 304 F.2d 280, the Court, on page 284, stated:

> "The Fourth Amendment does not require arresting officers clothed with such authority to procure a warrant of arrest, even if it is practicable for them to do so, but they may act without a warrant if they have reasonable grounds to believe that a felony has been committed or is being committed."

Applying these principles to the case at bar, what were the exceptional circumstances or the necessities of the moment which demanded action on the part of the officers without a warrant? True, the officers had the apartment and activities surrounding it under surveillance for several days before the arrest, but there was no concrete evidence that the crimes were being or had been committed until the officers observed the activities of Edwards and Mrs. Taylor. To have postponed making the search until a warrant could have been secured would have resulted in a defeat of their undertaking—the parties committing the offenses and the object of the search would have disappeared. While the crime was being committed in the presence of the officers, it was necessary for them to act and act immediately. Furthermore, it was their duty to do so. How then could it be said that the search was unreasonable?

The right of search is incidental to lawful arrest. *Crawford* v. *United States* (Va.), 160 F. (2d) 629; *Ker* v. *California, supra.*

Hence, the evidence obtained by the officers in making the search, to-wit, was properly admissible.

CONCLUSION

We do not believe that in the case at bar a "fraction of an inch beyond Goldman" is presented. Nowhere in the

record is there disclosed evidence which shows that the microphone, called "spiked mike" by the petitioner, physically penetrated the premises occupied by the defendant. The doctrine enunciated in the *Silverman* and *Goldman* cases should not be set aside. State searches and seizures should be judged not by the Fourth Amendment but by the flexible concept of fundamental fairness of right to a free system, embraced in the due process clause of the Fourteenth Amendment. *Wolf* v. *Colorado,* 338 U. S. 325. See, Mr. Justice Harlan's opinion in *Ker* v. *California, supra.*

The case at bar is entirely different from the case of *Mapp* v. *Ohio, supra.* There the search was clearly unreasonable and the legality under the Ohio law was indeed questionable, even admittedly illegal. In the case at bar, the search was reasonable, founded upon probable cause and therefore valid under Virginia law and under the doctrines enunciated by this Honorable Court.

From the foregoing, it will be observed that there is no new questions raised by the petition for writ of certiorari. The legal principles have already been determined. It is clear from the Record that the Virginia Court of Appeals followed the criterion established by this Court. Therefore, we maintain that the petition fails to present a substantial federal question.

We submit that the petition for a writ of certiorari should be denied.

Respectfully submitted,

ROBERT Y. BUTTON
Attorney General of Virginia

D. GARDINER TYLER
Assistant Attorney General

Supreme Court–State Library Building
Richmond 19, Virginia

CERTIFICATE OF SERVICE

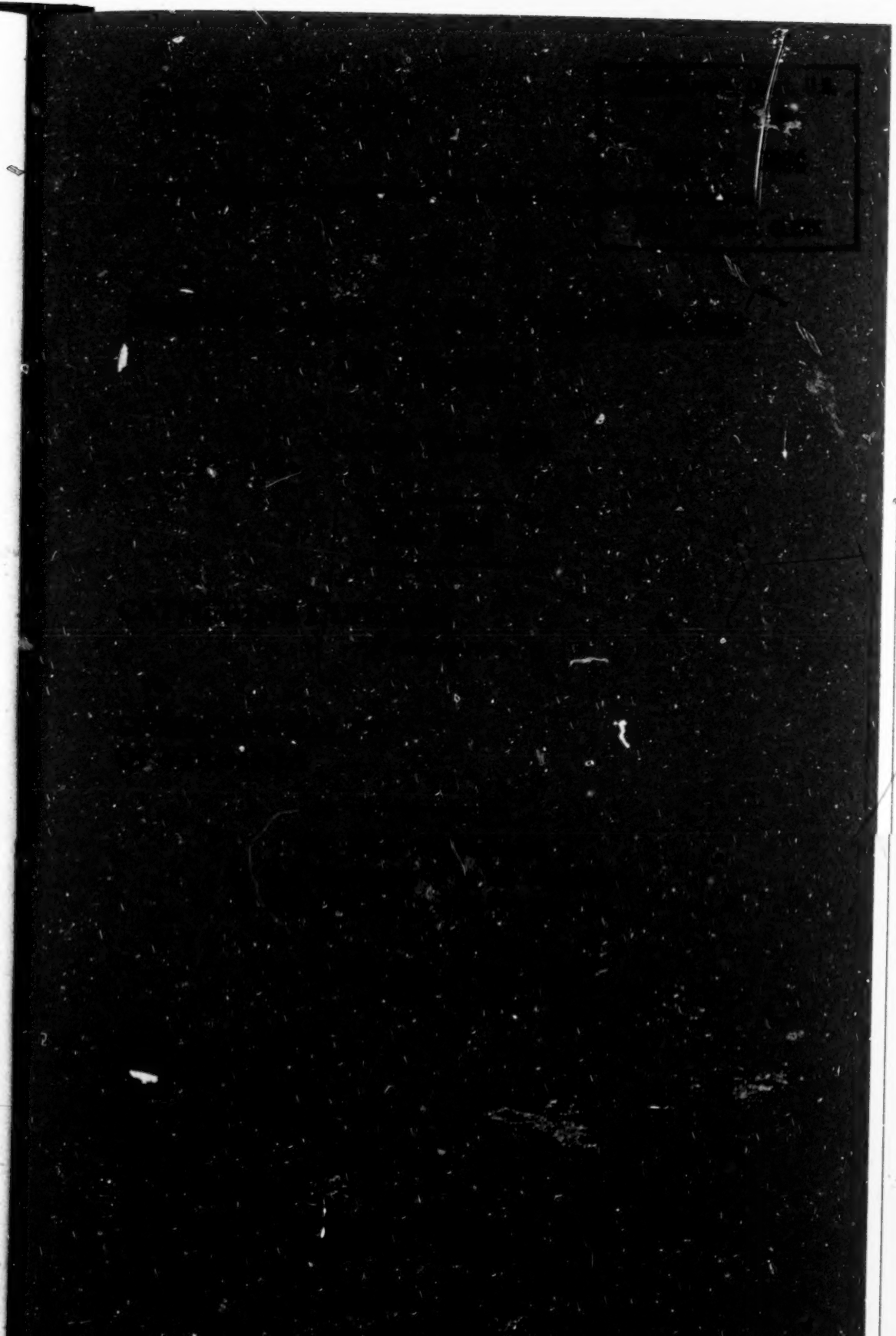
I hereby certify that I have forwarded a copy of the foregoing Response to Calvin H. Childress, Esq., 342 Law Building, Norfolk 10, Virginia, Counsel of Record for the petitioner, by depositing the same in a United States post office mail box, with first class postage prepaid, addressed to said Counsel of Record for the petitioner, at his post office address hereinabove set forth, on this 13th day of November, 1963.

.....

D. GARDINER TYLER
Assistant Attorney General

BLANK
PAGE

BLANK
PAGE



BLANK PAGE

IN THE

Supreme Court of the United States Of America

OCTOBER TERM 1963

No. 294

CATHERINE CLINTON
Petitioner

vs.

COMMONWEALTH
OF VIRGINIA

On Writ of Certiorari to the Supreme Court of Appeals of the Commonwealth of Virginia

BRIEF FOR THE PETITIONER

CALVIN H. CHILDRESS
343 Law Building
Norfolk, Virginia 23510
Counsel for Petitioner

BLANK
PAGE

INDEX

	Page
Opinions Below	1
Jurisdiction	2
Question Presented	2
Constitutional Provisions Involved	2
Statement of the Case	3
Argument	
I. Evidence obtained by use of a spike mike violates the Fourth Amendment under existing decisions of this Court	6
II. The Fourth and Fifth Amendments create a right of privacy rendering unconstitutional searches and seizures utilizing a spike mike	11
Conclusion	15

CITATIONS

Cases:

	Page
Boyd v. *United States*, 116 U. S. 616	12, 13
Clinton v. *Commonwealth*, 204 Va. 275	1
Davis v. *United States*, 328 U. S. 582	12
Ex parte Jackson, 96 U. S. 727	13
Fahy v. *Connecticut*, 11 L. Ed. 2d 171	11
Feldman v. *United States*, 322 U. S. 487	12
Goldman v. *United States*, 316 U. S. 129	8, 10, 11, 12, 14
Gouled v. *United States*, 255 U. S. 298	13
Ker v. *United States*, 374 U. S. 23	11,12
Lopez v. *United States*, 373 U. S. 427	8, 14
Olmstead v. *United States*, 277 U. S. 438	7, 14, 15
OnLee v. *United States*, 343 U. S. 747	8, 10
Silverman v. *United States*, 365 U. S. 505	6, 8, 10, 11

Miscellaneous:

Dash, Knowlton and Schwartz, *The Eavesdroppers*	9
John Adams, Works, Vol. II, p. 524	7
Tudor, James Otis, p. 66	12

BLANK
PAGE

IN THE

Supreme Court of the United States Of America

OCTOBER TERM 1963

No. 294

CATHERINE CLINTON
Petitioner

vs.

COMMONWEALTH
OF VIRGINIA

On Writ of Certiorari to the Supreme Court of Appeals of the Commonwealth of Virginia

BRIEF FOR THE PETITIONER

OPINIONS BELOW

There were no reports of the trial court's decisions.

The Decision of the Supreme Court of Appeals for the Commonwealth of Virginia has been reported as *Clinton* vs. *Commonwealth,* 204 Va. 275.

JURISDICTION

The judgment of the Supreme Court of Appeals for the Commonwealth of Virginia was entered on April 22, 1963; there were no petitions for rehearing and no orders granting an extension of time in which to petition for a Writ of Certiorari. The petition for a Writ of Certiorari was filed on July 19, 1963, and granted on December 9, 1963. The jurisdiction of this Court is invoked pursuant to 28 U.S.C.A., Section 1257 (3).

QUESTION PRESENTED

Whether evidence obtained by City Police Officers through the use of a spiked microphone stuck into a partywall separating adjoining efficiency apartments, which enabled the Police Officers to overhear everything said in the contiguous private efficiency apartment occupied by petitioner, is admissable against the the petitioner in a State Court.

CONSTITUTIONAL PROVISIONS INVOLVED

Fourth Amendment, Constitution of the United States:

"The right of the people to be secure in their persons, houses, papers and effects, against unreasonable searches and seizures, shall not be violated, and no warrants shall issue, but upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized."

Fifth Amendment, Constitution of the United States:

"No person shall be heard to answer for capital or otherwise infamous crime, unless on a presentment or indictment of a grand jury, except in cases arising in the land or naval forces, or in the militia, when in actual service in time of war or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb, nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty or property without due process of law; nor shall private property be taken for public use, without just compensation."

STATEMENT OF THE CASE

A two count indictment was returned by the Grand Jurors at the December, 1961, term of the Corporation Court of the City of Norfolk, Virginia. The petitioner was charged with the violation of Section 18.1-208 of the Code of Virginia 1950 as amended, knowingly receiving money from the earnings of a prostitute, not being for consideration deemed good or valuable in law, and of violation of Section 18.1-205 of the Code of Virginia 1950, as amended, unlawfully placing a female in a house of prostitution with the intent that she should live the life of a prostitute. (R. 3, 4).

Petitioner was first tried in the Corporation Court of the City of Norfolk, Virginia, on the 26th day of February, 1962, at which time the jury was unable to agree upon a verdict, whereupon they were discharged.

(R. 4, 5). Petitioner was again tried in said Court on 22 March 1962, at which time the jury found the petitioner guilty as charged and fixed her punishment at five (5) years imprisonment and a fine of Five Hundred Dollars. ($500.00). (R. 5, 6).

During retrial, City Police Officer, Earl H. Beach, testified that beginning October 21, 1961, he was assigned to keep surveillance of Apartment 103 which apartment had been rented by petitioner and her husband under another name. Police Officer Beach kept the apartment under surveillance from the street on 21 October 1961, and on 23 October 1961, he began a surveillance from the adjoining apartment, Apartment 102. (R. 28). In response to a question as to how he could hear from the next apartment, Police Officer Beach testified as follows at R. 31, 32:

> A. Yes, Sir. Some of the time I was in the bathroom. From the medicine cabinet, you could hear part of the conversation there and I had a device that would amplify the sound so that you could hear it in the other room.
>
> Mr. Reid: Spiked Device?
>
> A. Yes, Sir: small device.
>
> Mr. Reid: Object to anything he heard with the spiked device and object to his testimony in its entirety unless he could tell what portions that he could hear to with his ear to the medicine cabinet.
>
> Mr. Whitehurst: Your honor, this is also in the next door apartment; listening to what was going

on in the apartment that this defendant forged a name. I suggest this is material for the jury to hear. What he can hear, whether he used a device or had a hearing aid or even put on glasses, this gets to the truth and should come in.

Mr. Reid: On the basis of the spiked device, Your Honor, it is an unreasonable seizure under the 4th Amendment of the Constitution. As such I submit to the Court, it is not admissible. Secondly, the Police Officer testified that part of the conversation he could hear through the medicine cabinet.

Unless he can qualify as to what portion of that he heard through that, I submit his testimony should be stricken en toto.

The Court: Overruled. Exception noted.

Mr. Reid: Save the point, if Your Honor please.

On cross examination, Police Officer Beach testified further as follows, R. 37.

Q. "This spike, was it driven in the wall?

A. It wasn't driven in.

Q. Stuck in the wall?

A. Yes, Sir.

Q. In what portion of the apartment was that?

A. The whole apartment was just one-room efficiency. It would be in the wall that was separating the two apartments."

At the conclusion of trial, trial counsel for petitioner again moved that the evidence of Officer Beach be stricken on the ground, among others, that it was the result of an unlawful search and seizure by reason of the spiked electronic listening device. (R. 39).

Police Officer Beach continued his surveillance of the apartment rented by petitioner by means of the spiked device on 23, 24 and 25 October, 1961 and related into evidence the conversations he thereby heard. (R. 33, 34 and 35). The surveillance was terminated by a raiding party breaking into the apartment rented by petitioner and there was no evidence of any search warrant. (R. 38).

Upon grant of a Writ of Error and Supersedeas, the Supreme Court of Appeals of Virginia affirmed the conviction of petitioner. The Court distinguished *Silverman* vs. *United States,* 365, U. S. 505, 81 S Ct. 679, 5 L. Ed. 2d 734, on the grounds that the record showed that there was only a small penetration on the wall by the spiked device and that the record does not show, "That the eavesdropping was accomplished through 'an unauthorized physical penetration into the premises' occupied by defendant." (R. 47).

ARGUMENT

I. Evidence obtained by means of a spike mike violates the Fourth Amendment under existing decisions of this Court.

The Fourth Amendment prevents only "unreasonable" searches and seizures. What constitutes an unreasonable search and seizure is a vexing problem to bench and bar under present day circumstances. To our forefathers when the Fourth Amendment was adopted, the problem was relatively simple. Breaking and entering by force and the seizure of papers along with the hated general search warrant was the nature of the evil in those days. It has been suggested that this was one of the main causes of the American Revolution. *see John Adams, Works,* Vol. II, p. 524. When the problems caused by electronic surveillance first arose, this principle that there must be an actual physical trespass to constitute an unreasonable electronic search became engrafted over strong dissent in the law. *Olmstead* v. *United States,* 277 U. S. 438. In *Olmstead* government agents had the telephone lines of the suspect's office tapped and thus listened and made stenographic notes of all telephone conversations. However, as there was no actual physical trespass into the suspect's office, it was held that tapping the telephone lines outside of the suspect's office and listening to his voice which the suspect intended to send over the wires was not an unconstitutional search and seizure. *Olmstead* v. *United States, supra.* This type excess of the law enforcers zeal therefore was required to be curbed by federal legislation.

Following the principle of the need of an actual trespass, it was held that merely laying a detectaphone against an office wall and hearing on the outside of the office words spoken within the office not accompanied by a trespass into the office, was not an unrea-

sonable search and seizure. *Goldman* v. *United States,* 316 U. S. 129. When a friend wired as a walking radio, literally with an antenna up his sleeve, walked into the business place of a suspect and caused the suspect to make admissions which were broadcast and heard by an agent waiting with a radio receiver, it was held not to be an unreasonable search and seizure as there was no trespass. *OnLee* v. *United States,* 343 U. S. 747. Similarly, when an agent who had previously been offered a bribe returned to the office of the briber and recorded subsequent conversations by means of a hidden recorder, it was held not to be an unreasonable search and seizure as, again, there was no trespass. *Lopez* v. *United States,* 373 U. S. 427.

A problem arose when a spike mike with a spike nearly a foot long was used by insertion for about seven inches under the floorboard of an adjoining row house which spike made contact with the heating duct of the suspects' house thus making the heating system an enlargement or giant sounding board for the spike mike. This Court met this problem by holding that this electronic appropriation of the heating system constituted an actual physical trespass and this was an unreasonable search and seizure. *Silverman* v. *United States,* 365 U. S. 505. The Court was careful to say at *Silverman* v. *United States,* supra, p. 511.

> "Here by contrast, the officers overheard the petitioners' conversation only by usurping part of the petitioners' house or office — a heating system which was an integral part of the premises occupied by the petitioners, a usurpation that was

effected without their knowledge and without their consent. *In these circumstances we need not pause to consider whether or not there was a technical trespass under the local property law relating to party walls.* Inherent Fourth Amendment rights are not inevitably measured in terms of ancient niceties of tort or real property law." (Emphasis added)

And at p. 512:

"But decision here does not turn upon the technicality of a trespass upon a party wall as a matter of local law. It is based upon the reality of an actual intrusion into a constitutionally protected area." (Emphasis added)

It is submitted that the "actual intrusion" found in *Silverman* to qualify under the doctrine of a needed trespass was nothing more or less than an electronic intrusion. I further submit that this electronic intrusion in *Silverman* of the spike mike, while not an actual physical intrusion, was in effect a more gross intrusion than that which could have been effected by the physical trespass of an officer. This is the situation in the instant case. Here we have the admitted use of a spike mike stuck in the party wall of contiguous rooms. The significance of the use of a spike mike is set forth in the section on "Tools" in Dash, Knowlton and Schwartz's *The Eavesdroppers* at p. 31.

"Where access to the room is impossible, 'contact mikes' are available which can pick up sounds

through a common wall. The microphone is fastened to the wall with a spike which is driven into the common stud between the rooms, that is, the common column to which the lath or wallboard is fastened. Obviously, there are a few cases where common studding is not used, and in such cases, this type of eavesdropping is impossible."

Admittedly, the intrusion into the apartment occupied by the accused here was not as gross as that in *Silverman.* However, the actual electronic intrusion here was, I submit, as offensive to the Fourth Amendment as was that in Silverman.

To hold that the electronic intrusion of the spike mike in the instant case was a real and actual intrusion within the *Silverman* decision does not require a reversal of nor is it in conflict with *Goldman* v. *United States,* 316 U. S. 129. The distinction is that in *Goldman* a detectaphone which merely amplifies sounds which come through a wall was used while in the instant case, as in *Silverman,* there was used a spike mike designed to actually intrude electronically into the home or office and appropriate sounds from within this constitutionally protected area and project them from within to the listener on the outside. This may appear to be a fine distinction, but it offers a clear test. This is clearly set forth by Justice Burton in his dissent in *OnLee* v. *United States,* 343 U. S. 747, at 767:

"While this test draws a narrow line between what is admissible and what is not, it is a clearly

ascertainable line. It is determined by where the "effects" are seized or, as here, where the words are picked up."

I submit that this test, clear and easily understood by law enforcement officers, should be accepted by the Court. The test should be that any electronic device designed to electronically penetrate into and overhear words spoken within the house or office constitute an unreasonable search and seizure under the Fourth Amendment while electronic devices designed merely to magnify sounds which have come through walls and which pick up and magnify such sounds only after the sounds have come through the walls of the private home or office are reasonable searches. Tested by this standard, the instant case results in an unreasonable search and seizure as the reasonableness of a state search and seizure is to be judged by Fourth Amendment standards. *Ker* v. *California,* 374 U. S. 23. It is further submitted that the introduction of the evidence so obtained was prejudicial as there "is a reasonable possibility that the evidence complained of might have contributed to the conviction. *Fahy* v. *Connecticut,* 11 L. Ed. 2d 171, 173.

II. The Fourth and Fifth Amendments create a right of privacy rendering unconstitutional searches and seizures utilizing a spike mike.

If the Court finds that the instant case is not within the principle of *Silverman* v. *United States, supra,* but is controlled by *Goldman* v. *United States, supra,*

it is submitted that *Goldman* and the cases controlling and determining its decision should be reviewed as to their soundness in relation to the Fourth and Fifth Amendments.

The Fourth and Fifth Amendments met evils primary in the minds of the drafters of the Constitution. These evils were searches under general warrants and writs of assistance. see *Tudor,* James Otis, p. 66. Thus the Fourth and Fifth Amendments have a dual purpose—protection of the privacy of an individual, his right to be let alone, and protection of the individual against compulsory production of evidence to be used against him. *Davis* v. *United States,* 328 U. S. 582, 587. Or expressed slightly differently, the Fourth and Fifth Amendments intertwine and express "supplementary phases of the same constitutional purpose to maintain inviolate large areas of personal privacy." *Feldman* v. *United States,* 322 U. S. 487, 489-490. This right of privacy is also expressed in the old cliche "A man's home is his castle." This connotes that a man has the right to retreat to his home and there be free from unannounced governmental intrusions. see *Ker* v. *United States,* 374 U. S. 23, 51 (dissent).

This right of privacy has long been established in our law. This right was lucidly expressed in *Boyd* v. *United States,* 116 U. S. 616, 630.

> "It is not the breaking of his doors, and the rummaging of his drawers, that constitutes the essence of the offense; but it is the invasion of his indefeasible right of personal security, personal liberty

and private property, when that right has never been forfeited by his conviction of some public offense,—it is the invasion of this sacred right which underlies and constitutes the essence of Lord Camden's judgment. Breaking into a house and opening boxes and drawers are circumstances of aggravation; but any forcible and compulsory extortion of a man's own testimony or of his private papers to be used as evidence of a crime or to forfeit his goods, is within the condemnation of that judgment. In this regard the Fourth and Fifth Amendments run almost into each other."

The issue in *Boyd* was the constitutionality of a provision in the customs laws in a forfeiture situation requiring an individual to produce the invoice or to be conclusively deemed to have admitted the allegations in the affidavit requesting it. This did not present the conventional or traditional picture of a forcible entry into a man's home prior to a search and seizure. Yet, the Court held in *Boyd* that this required production of the invoice or the alternative admission of allegations in the affidavit requesting it was in violation of the Fourth and Fifth Amendments. Certainly, there is no actual physical trespass when a friendly visitor surreptitiously removes a paper from a desk, yet evidence so obtained was held inadmissible in *Gouled* v. *United States,* 255 U. S. 298. Again, the Court must have been looking at the underlying principle of the Fourth Amendment to hold as it did in *Ex parte Jackson,* 96 U. S. 727, 733 that its protection extended to a letter in the mails.

Thus, the decision in *Olmstead* v. *United States,* 277 U. S. 438, holding that evidence obtained by wiretapping did not violate the Fourth and Fifth Amendments brought forth a vigorous dissent by Justice Brandeis in which he said at pages 478-479

> "The protection guaranteed by the Amendments is much broader in scope. The makers of our Constitution undertook to secure conditions favorable to the pursuit of happiness. They recognized the significance of man's spiritual nature, of his feelings and of his intellect. They knew that only a part of the pain, pleasure and satisfactions of life are to be found in material things. They sought to protect Americans in their beliefs, their thoughts, their emotions and their sensations. They conferred, as against the Government, the right to be let alone—the most comprehensive of rights and the right most valued by civilized man. To protect that right, every unjustifiable intrusion by the Government upon the privacy of the individual, whatever the means employed, must be deemed a violation of the Fourth Amendment. And the use, as evidence in a criminal proceeding of facts ascertained by such intrusion must be deemed a violation of the Fifth."

The Court is now urged to accept the dissent in *Olmstead* v. *United States, supra,* reverse that decision and to reverse the decisions it controls including *Goldman* v. *United States,* 316 U. S. 129. see *Lopez* v. *United States,* 373 U. S. 427, 456 (dissent). It is submitted that upon accepting as correct the interpretation

of the Fourth and Fifth Amendments as set forth in the discent in *Olmstead,* then the Court will find that the use of the spike mike in the instant case and the entry into evidence of the evidence so obtained was in violation of these Amendments.

CONCLUSION

For the foregoing reasons, it is submitted that this Court should hold that the use of a spike mike and admission into evidence of information so obtained violates the Fourth and Fifth Amendments requiring reversal of the verdict of guilty, and remand this case for new trial.

Respectfully submitted,

CALVIN H. CHILDRESS
Counsel for Petitioner
343 Law Building
Norfolk, Virginia

BLANK PAGE

FILE COPY

Office-Supreme Court, U.S.
FILED
APR 6 1964
JOHN F. DAVIS, CLERK

No. 294

In the

Supreme Court of the United States

October Term, 1963

CATHERINE CLINTON,

Petitioner

v.

COMMONWEALTH OF VIRGINIA,

Respondent

BRIEF ON BEHALF OF RESPONDENT

ROBERT Y. BUTTON
Attorney General of Virginia

D. GARDINER TYLER
Assistant Attorney General

Supreme Court-State Library Building
Richmond 19, Virginia

BLANK
PAGE

TABLE OF CONTENTS

	Page
OPINION BELOW	1
QUESTIONS PRESENTED	1
CONSTITUTIONAL PROVISIONS ALLEGEDLY INVOLVED	2
STATEMENT OF THE CASE	2
ARGUMENT	
I. Evidence Obtained Without Physical Invasion Of Constitutionally Protected Area Is Admissible	7
II. There Was No Unreasonable Search, Electronically Or Otherwise	19
III. Petitioner Using Her Apartment For An Illegal Purpose Not Entitled To Protection Under The Fourth Amendment	26
IV. Evidence Obtained By Use Of Electronic Means Should Not Be Excluded In A Criminal Prosecution	27
V. The Evidence Sought To Be Excluded Did Not Contribute To The Conviction	28
CONCLUSION	34

APPENDIX

Code of Virginia (1950), as amended:

Section 18.1-205	App. 1
Section 18.1-208	App. 1
Resume of Conversations Heard by Officer Beach While Making Surveillance of the Petitioner's Apartment	App. 1

TABLE OF CITATIONS

Cases

Page

Abrams v. United States, 250 U. S. 616, 63 L. Ed. 1173 ..... 31, 32, 33

Byrd v. Commonwealth, 158 Va. 897, 900 25

Clinton v. Commonwealth, 204 Va. 275, 130 S.E. (2d) 437 1

Draper v. United States (1958), 358 U. S. 307, 3 L. Ed. (2d) 327 ..... 21, 24

Evans v. United States, 153 U. S. 608, 38 L. Ed. 839, 14 S. Ct. Rep. 935 31

Fahy v. Connecticut, decided December 2, 1963, 149 Conn. 577. 183 Atl. (2d) 256 28

Goldman v. United States, 316 U. S. 129, 135, 62 S. Ct. 933, 86 L. Ed. 1322 ..... 8, 10, 11, 18

Ker v. California, 374 U. S. 23, 83 S. Ct. 1623, 10 L. Ed. (2d) 726 ..... 21, 22, 23, 24, 25

Lanz v. New York, 370 U. S. 129, 8 L. Ed. (2d) 384 26

Lopez v. United States, 373 U. S. 427, 83 S. Ct. 1381, 10 L. Ed. 2d 462 ..... 13, 14, 27

Mapp v. Ohio, 367 U. S. 643 28

People v. Cahan, 44 Cal. (2d) 434, 282 P. (2d) 905 (1955) 32

People v. Tarrantino, 290 P. (2d) 505 (Cal.) 32

Silverman v. United States, 365 U. S. 505, 5 L. Ed. (2d) 734 ..... 8, 9, 10, 11, 15, 18

Stoner v. California, decided March 23, 1964, 32 U. S. Law Week 4227 ..... 28, 29

United States v. Goldman, 118 F. (2d) 310, 314 ..... 9, 26

United States v. Rabinowitz, 339 U. S. 56-86 20

Other Authorities

Page

Code of Virginia (1950) as amended:
- Section 18.1-205 ..... 2, 24, 33, App. 1
- Section 18.1-208 ..... 2, 30, App. 1

Constitution of the United States, Fourth Amendment 2, 7, 19, 20, 27

Constitution of Virginia, Section 10 19

Searches, Seizures and Immunities, Varon, Vol. 1, p. 113 20

BLANK
PAGE

In the

Supreme Court of the United States

October Term, 1963

No. 294

CATHERINE CLINTON,

Petitioner

v.

COMMONWEALTH OF VIRGINIA,

Respondent

BRIEF ON BEHALF OF RESPONDENT

OPINION BELOW

The conviction of the petitioner (hereinafter sometimes referred to as defendant) was affirmed by the Supreme Court of Appeals of Virginia, as shown by the opinion of that Court reported in the case of *Clinton* v. *Commonwealth*, 204 Va. 275, 130 S. E. (2d) 437. The judgment was entered on April 22, 1963.

QUESTIONS PRESENTED

1. Whether evidence obtained through the use of a microphone (an electronic device) in the absence of a physical invasion of the petitioner's apartment is admissible against the petitioner in a State court.

2. Whether the alleged search of the petitioner's apartment by electronic means was an unreasonable search condemned by the Fourth Amendment.

3. Whether *all* evidence obtained by the use of electronic means should be excluded in a criminal prosecution.

4. Whether the lessee of an apartment rented for the sole purpose of maintaining a house of prostitution (in violation of the State law) is entitled to protection of the Fourth Amendment to the Constitution of the Untied States.

5. Whether a judgment or conviction in a State court should be reversed where there is no reasonable possibility that the evidence complained of might have contributed to the conviction.

CONSTITUTIONAL PROVISIONS ALLEGEDLY INVOLVED

The petitioner contends that the provisions of the Fourth and Fifth Amendments to the Constitution of the United States have been violated.

The respondent denies this.

STATEMENT OF THE CASE

The petitioner was found guilty under a two count indictment of the violation of:

(1) Section 18.1-208, Code of Virginia (1950) as amended, knowingly receiving money from the earnings of a female engaged in prostitution; and

(2) Section 18.1-205 of said Code, unlawfully placing a female in a house of prostitution with the intent that she should live the life of a prostitute.

These sections of the Virginia Code are set forth in the appendix to this brief.

The convictions were rendered in the Corporation Court of the City of Norfolk on February 26, 1962. There was no opinion rendered by the Judge of that Court and there is no requirement that the trial court make specific findings and render opinions.

As the petitioner apparently takes the position that the conversations of the occupants of Apartment 103 (rented to the petitioner and her husband) which were overheard by Officer Beach by means of a microphone were essential to the establishment of the Commonwealth's case, it is well to point out that this is not correct. The testimony of Katherine Taylor, Helen Buckridge and S. N. Edwards independently from that of Officer Beach established the guilt of the petitioner.

The fact that the petitioner had given a false name in registering or in renting the apartment (No. 103) led to suspicion by the police authorities that there may be something wrong about her activities. These suspicions were heightened after the surveillance undertaken by Officer Beach on October 21, 1961, from a point on the street, which indicated a heavy traffic of males and females entering the apartment. Again, on October 23, 1961, the surveillance of the apartment was continued, this time from the adjoining apartment (No. 102). Surveillance from this point continued on October 24 and 25, the petitioner being arrested on the latter date.

The following is a resume of the evidence:

The petitioner, Catherine Clinton, sometimes hereinafter referred to as defendant, on several occasions talked to Katherine Taylor and Helen Buckridge about working for her as prostitutes. The two women agreed to work as

prostitutes for the defendant; they were to pay the defendant one-half of what they took in as the defendant would furnish the apartment and the customers.

The petitioner first resided on Olney Road, and later on Sewell Point Road, Norfolk Virginia. She and her husband, Harley Clinton, posed as Mr. and Mrs. Charles Morrison and during October 1961, rented the apartment (No. 103) at 9630 First View Street, Norfolk, Virginia, for the purpose of prostitution. The petitioner forged the name of Mr. and Mrs. Charles Morrison on the registration slip and made the rent payments (R. 7, 8). Katherine Taylor and Helen Buckridge both worked in the petitioner's apartment as prostitutes and gave one-half of their earnings to the petitioner for furnishing the apartment and the customers.

Officer Earl H. Beach of the Norfolk Police Division and fellow police officers were able to keep surveillance on the apartment for several days and by being in the adjoining apartment they were able to observe many male visitors to the petitioner's apartment who remained for a short time. Officer Beach heard much of the conversation and activity that took place in the petitioner's apartment by listening through a medicine cabinet in the bathroom wall. He also used a device that would amplify sounds and used this device on the wall separating the two apartments. It did not penetrate the petitioner's wall. Officer Beach was able to hear the defendant making various arrangements concerning the operation of her house of prostitution. Officer Beach was able to see everyone who entered and left the defendant's apartment. He was also able to hear everything that took place within the apartment.

Mr. S. N. Edwards went to the apartment as a customer on October 25, 1961. The defendant was there, along with

Katherine Taylor and Betty Johnson. The petitioner questioned Edwards closely as to where he got the telephone number and who he was. After her interrogation of Edwards, the petitioner left with the Johnson woman and said that she was going to look for a larger place. The petitioner actually went across the street to the parking lot and got into an automobile with her husband and waited.

At this point the police entered the apartment after knocking at the door and identifying themselves (R. 38). Both Katherine Taylor and Edwards were undressed and preparing to have sexual relations with each other (R. 9). The police entered the apartment as they had reasonable grounds to believe that a felony had been committed or was being committed.

The following excerpts from the testimony of Officer Beach embrace the only description of the hearing device and how it was used:

> "MR. WHITEHURST: (R. 31)
> "Q. Answer how you could hear from the apartment.
> "A. Yes, sir. Some of the time I was in the bathroom. From the medicine cabinet, you could hear part of the conversation there and I had a device that would amplify the sounds so that you could hear it in the other room.
>
> "MR. REID: Spiked device?
> "A. Yes, sir; small device."
>
> * * *
>
> "Q. This spike, was it driven in the wall?
> "A. It wasn't driven in.
> "Q. Stuck in the wall?
> "A. Yes, sir.

"Q. In what portion of the apartment was that?

"A. The whole apartment was just one-room efficiency. It would be the wall that was separating the two apartments.

"Q. Was it in the center of the wall, the back of the wall, or what?

"A. No, sir. It would be closer to the front of the house. It would be a little off from the center of the wall."

The record does not disclose a breakdown of the portion of the conversations Officer Beach picked up by means of the hearing device and the portion that he heard through his natural sense of hearing, but the Officer did state definitely that he heard the conversation of the man and woman in the bathroom through the medicine cabinet in his apartment.

The following is a chronological resume of Officer Beach's testimony on October 21, 1961 before he made surveillance from the adjoining apartment and before he used the so-called spiked mike:

1. At 11:10 a.m. a man in a Ford car parked on the Colonial Store lot and looked at No. 9630 First View Street.

2. At approximately the same time a woman, later identified as the defendant, came to the window and waved to the man in the car. The man was later identified as defendant's husband.

3. At 11:35 p.m. (a.m.) a white female (identified as Catherine Taylor) went into 9630 First View Street.

4. At 11:30 a.m. a white male went up to 9630 First View Street.

5. At 1:30 p.m. this man came out [of the apartment].

6. At 12 Noon a white female came out 9630 First View Street and went a half block up the street to a bar. She was identified at Betty Johnson.

7. At 1:30 p.m. a white female (the defendant) came out the apartment and got into an automobile bearing a Virginia license.

8. At 2:15 p.m. Harry Clinton, the defendant's husband, came back and parked his car on the lot and went into the apartment.

9. At 3 p.m. a white male came out the apartment, got into a car and left.

10. At 3:25 p.m. a white male (identified as Harry Clinton, the defendant's husband) came out the apartment, proceeded to the parking lot and got into his car and sat there.

11. At 3:40 p.m. a white female (the defendant) came out the apartment and left with her husband.

ARGUMENT

I.

Evidence Obtained Without Physical Invasion Of Constitutionally Protected Area Is Admissible

A review of the cases decided by this Honorable Court leads to the conclusion that in order to exclude evidence obtained by an unauthorized seizure in violation of the Fourth Amendment, there must be a showing that there has been a physical invasion of the premises.

The Virginia Supreme Court of Appeals concluded that "the record does not show that the eavesdropping was accomplished through 'an unauthorized physical penetration

of the premises occupied by the defendant.'" The decision of the Virginia Court is not in conflict with the views expressed by this Court in *Silverman* v. *United States,* 365 U. S. 505, 5 L. Ed. (2d) 734, but is in accordance therewith. In that case, the evidence clearly showed that the spike attached to the microphone penetrated the party wall sufficiently to make contact with "a heating duct servicing the house occupied by the petitioner thus converting their entire heating system into a conductor of sound." It is manifest from the concurring opinion of Mr. Justice Clark and Mr. Justice Wittaker (365 U. S. 513) that the decision in *Silverman* is based on the premise that there was in fact "an unauthorized physical penetration into petitioner's premises." The majority opinion is of the same purport:

> "It [the decision] is based upon the reality of an actual intrusion into the constitutionally protected area." (365 U. S. 512)

In the case of *Goldman* v. *United States,* 316 U. S. 129, 62 S. Ct. 933, 86 L. Ed. 1322, the Court held that placing a detectophone against an office wall in order to listen to conversations taking place in the office next door did not violate the Fourth Amendment. There, as here, in the case at bar, there was no physical encroachment within the constitutionally protected area. The device used in the case at bar was more akin to the detectophone than the so-called "spiked mike" used in the *Silverman* case. The Court, in that case, refused to re-examine the *Goldman* case but pointed out whether or not there was a physical invasion of the defendant's premises is the vital factor in determining the validity of the evidence thereby secured. If there is an unlawful physical invasion of the defendant's premises in

order to obtain the evidence, then the Fourth Amendment is violated; otherwise not. The Court, in the *Silverman* case, makes clear the distinction between the two cases. We quote from its opinion (365 U. S. 510):

> "The absence of a physical invasion of the petitioner's premises was also a vital factor in the Court's decision in Olmstead v. United States, 277 U. S. 438, 72 L. ed. 944, 48 S. Ct. 564, 66 A.L.R. 376. In holding that the wire-tapping there did not violate the Fourth Amendment, the Court noted that '[t]he insertions were made without trespass upon any property of the defendants. They were made in the basement of the large office building. The taps from house lines were made in the streets near the houses.' 277 U.S., at 457. 'There was no entry of the houses or offices of the defendants.' 277 U.S., at 464. Relying upon these circumstances, the Court reasoned that '[t]he intervening wires are not part of [the defendant's] house or office any more than are the highways along which they are stretched.' 277 U.S. at 465.
>
> "Here, by contrast, the officers overheard the petitioners' conversations only by usurping part of the petitioners' house or office—a heating system which was an integral part of the premises occupied by the petitioners, a usurpation that was effected without their knowledge and without their consent."

In the case of *United States* v. *Goldman*, 118 F. (2d) 310, 314, the Circuit Court of Appeals for the District of Columbia aptly stated:

> "Nor was any error committed in denying Schulman's motion, in which the Goldman's did not join, to suppress the evidence obtained by government agents by the use of the detectaphone and allowing it to be introduced at the trial. Nothing was obtained as a

result of any secret entry of Schulman's office. No trespass upon his premises in any way helped to obtain the evidence. The situation was legally no different from the use of an amplifier of sound to overhear conversation not otherwise audible to the listener as for instance, the use of a common aid to hearing by a person somewhat deaf. No communication by wire or radio was intercepted to make applicable the provisions of Sec. 605 of the Communications Act of 1934, c. 652, 48 Stat. 1046, 1103, 47 U.S.C.A. § 605, as construed in Nardone v. United States, 308 U.S. 338, 60 S. Ct. 266, 84 L.Ed. 307. There was only an instance of eavesdropping which alone, though an invasion of privacy, is not a violation of a recognized legal right to privacy. Conspirators who discuss their unlawful schemes must take the risk of being overheard and the risk of having what is overheard used against them provided there is otherwise no trespass by the listener or violation of a statutory right to use a means of communication thus made immune from interception. Olmstead v. United States, 277 U.S. 438, 48 S.Ct. 564, 72 L.Ed. 944, 66 A.L.R. 376. Compare, United States v. Feldman, 3 Cir., 104 F.2d 255; and Smith v. United States, 4 Cir., 2 F.2d 715."

In affirming the judgment of the circuit court of appeals in the case of *Goldman* v. *United States,* 316 U. S. 129, 135, in passing on the question of whether the use of the detectaphone by Government agents was in violation of the Fourth Amendment, the Court stated:

"We hold that the use of the detectaphone by Government agents was not a violation of the Fourth Amendment.

"In asking us to hold that the information obtained was obtained in violation of the Fourth Amendment, and that its use at the trial was, therefore, banned by

the Amendment, the petitioners recognize that they must reckon with our decision in Olmstead v. United States, 277 US 438, 72 L ed 944, 48 S Ct 564, 66 ALR 376. They argue that the case may be distinguished. The suggested ground of distinction is that the Olmstead Case dealt with the tapping of telephone wires, and the court adverted to the fact that, in using a telephone, the speaker projects his voice beyond the confines of his home or office and, therefore, assumes the risk that his message may be intercepted. It is urged that where, as in the present case, one talks in his own office, and intends his conversation to be confined within the four walls of the room, he does not intend his voice shall go beyond those walls and it is not to be assumed he takes the risk of someone's use of a delicate detector in the next room. We think, however, the distinction is too nice for practical application of the constitutional guaranty and no reasonable or logical distinction can be drawn between what federal agents did in the present case and state officers did in the Olmstead Case.

"The petitioners ask us, if we are unable to distinguish Olmstead v. United States, to overrule it. This we are unwilling to do."

To say that the use of electronic devices which enable a listener to pick up conversations emanating from adjoining property where there is no physical penetration of the premises (a trespass) occupied by those conversing should be prohibited is not sound. In drawing the line in the *Goldman* and *Silverman* cases, *supra*, as this Court has thereby refused to impose the exclusionary rule where there is no actual physical penetration, is sensible and logical.

Surely, the officer [occupant of the adjoining apartment] violates no law or constitutional provision when he listens with his own ears to conversations emanating from the other

room or apartment and using what he hears as evidence in a criminal prosecution. Does he violate the law if he places his ear against the wall of his own apartment? Does he violate the law if he wears a hearing aid? Does he violate the law if he places a microphone against the wall of his own apartment? Does he violate the law when he sticks this microphone on the wall of his own apartment? Does an officer violate the law by observing the activities of persons from a point outside the physical limits of the property of those persons? Does an officer violate the law if he uses a flashlight (electronic device) to aid him in making such observations? To ask these questions is to answer them. If the evidence collected in such ways cannot be used in criminal prosecutions, then the enforcement of criminal law and the administration of justice in this country will be severely handicapped.

The Supreme Court of Appeals of Virginia, in affirming the judgment of the Corporation Court of the City of Norfolk in passing on the question of whether or not the evidence obtained by the police officer through the use of the microphone should be admitted, stated in its opinion (204 Va. 275, 281) (R. 47):

> "The *Silverman* case is factually different from the case at bar and it is not controlling. Officer Beach was asked if the instrument used was a spiked device and he responded 'Yes, sir; small device.' That is the only description given of it. The uncontradicted evidence is that it was not driven into the wall, but was 'stuck in' it. This is the only evidence as to any penetration of the party wall and it is reasonable to assume that the penetration was very slight such as one made by a thumb tack to hold the small device in place. *The record does not show that the eavesdropping was accomplished through 'an unauthorized physical penetration into*

> *the premises' occupied by defendant.* Thus, we hold that the evidence obtained by means of the listening device did not constitute a violation of the Fourth Amendment to the Constitution of the United States or Section 10 of the Constitution of the State of Virginia, and that it was not error to admit such evidence." (Italics supplied)

In the recent case of *Lopez* v. *United States,* 373 U. S. 427, 83 S. Ct. 1381, 10 L.ed 2d 462 the Court was asked to exclude evidence secured through the use of an electronic device. This Court did permit the recordings of a conversation to be considered in evidence. The recordings were taken down by a tiny wire recorder lodged in the pocket of the detective while he conversed with Lopez in Lopez' private office. The only similarity with the case at bar is that in both cases there was no trespass or unauthorized physical penetration of the defendant's premises, and an electronic device was used. In one case (the case at bar) to amplify the sounds (conversations) and the others (Lopez) to record the conversations.

Chief Justice Warren in a concurring opinion expressed the view (83 S. Ct., at 1389, 10 L.ed 2d 472):

> "I also share the opinion of Mr. Justice Brennan that the fantastic advances in the field of electronic communication constitute a great danger to the privacy of the individual; that indiscriminate use of such devices in law enforcement raises grave constitutional questions under the Fourth and Fifth Amendments; and that these considerations impose a heavier responsibility on this Court in its supervision of the fairness of procedures in the federal court system. However, *I do not believe that as a result, all uses of such devices should be proscribed either as unconstitutional or as unfair law enforcement methods."* (Italics supplied)

In the opinion of the Court, we find this highly sufficient statement (83 S. Ct., at 1387, 10 L.ed 2d 470):

> "The Court has in the past sustained instances of 'electronic eavesdropping' against constitutional challenge, when devices have been used to enable government agents to overhear conversations which would have been beyond the reach of the human ear. See, e.g., Olmstead v. United States, 277 U.S. 438, 72 L. ed. 944, 48 S. Ct. 564, 66 ALR 376; Goldman v. United States, 316 U.S. 129, 86 L. ed 1322, 62 S. Ct. 993. It has been insisted only that the electronic device not be planted by an unlawful physical invasion of a constitutionally protected area. Silverman v. United States, supra."

Counsel for the petitioner has misconstrued the meaning of the decision in the *Silverman* case, *supra*. He has described the actual intrusion in that case to be an "electronic intrusion," whatever that term implies. On page 9 of his brief, he states:

> "It is submitted that the 'actual intrusion' found in *Silverman* to qualify under the doctrine of a needed trespass was nothing more or less than an electronic intrusion. I further submit that this electronic intrusion in *Silverman* of the spike mike, *while not an actual physical intrusion,* was in effect a more gross intrusion than that which could have been effected by the physical trespass of an officer. *This is the situation in the instant case.*" (Italics supplied)

In *Silverman,* there was in fact a physical intrusion. The spike penetrated the party wall 7¼ inches and made actual physical contact with a heating duct making the heating duct a giant microphone running through the entire house.

We believe that the decision of the Court in *Silverman* is differentiated from the earlier decisions by the statement made by Mr. Justice Clark and Mr. Justice Whitaker concurring:

> "In view of the determination by the majority that the unauthorized physical penetration into petitioners' premises constituted sufficient trespass to remove this case from the coverage of earlier decisions, we feel obligated to join in the Court's opinion." (365 U.S. 505, 5 L. ed 740)

From the above-quoted language of petitioner's brief, *supra,* counsel for the petitioner admits that there was not an actual physical intrusion into the apartment of the petitioner. However, thereafter, in his brief, counsel argues that there was an intrusion into the apartment of the petitioner. (Brief, pp. 9, 10). The evidence in this case does not bear out this contention. The hearing device used by the officer was not described to any extent. The petitioner assumes that the spike on the device was driven into the wall to the extent that an unlawful trespass was effected. She also assumes that the spike was driven into the common studding to which the wall boards were fastened. There is no evidence of this whatsoever in the record. The evidence does not disclose the character of the wall, whether it was solid or whether it included common studding.

Petitioner seeks to establish the erroneous assumption that the spike attached to the microphone was driven into the common studding from a quotation (on page 9 of her brief) from the work of Dash, Knowlton, Schwartz, "The Eavesdroppers," in its section on tools, page 341, the inference being that the so-called "spike mike" could not pick up the

sounds unless same was driven into the common studding between the wall of the petitioner's apartment and the apartment occupied by Officer Beach and therefore the spike attached to the microphone was actually driven into the common studding. The following correspondence with Dr. Richard F. Schwartz disproves this assumption:

"October 29, 1963

"Dr. Richard F. Schwartz
"Assistant Professor
"Moore School of Electrical Engineering
"University of Pennsylvania
"Philadelphia 4, Pennsylvania

"Dear Dr. Schwartz:

"The writer has examined with great interest the work entitled 'The Eavesdroppers' of which you are a co-author. This office is interested in a case involving the use of electronic equipment where the premises of the defendant were invaded by officers after information was obtained through a hearing device commonly known as a spiked mike which was 'stuck' on a wall. On page 341 of your book you describe the use of 'contact mikes' and state that their use is limited to where the spike is driven into the common column to which the lathe or wall board is fastened. In your work you do not describe the so-called detectophone which the writer understands is leaned against the wall and can detect a conversation carried on in a adjoining room. Is there any difference between this and the spiked mike where the spike is not driven into the common studding?

"With high regards and best wishes, I am

"Sincerely yours,

"/s/ D. Gardiner Tyler
"Assistant Attorney General"

DGT:MVH

"31 October 1963

"Mr. D. Gardiner Tyler
"Assistant Attorney General
"Commonwealth of Virginia
"Office of Attorney General
"Richmond, Virginia

"Dear Mr. Tyler:

"This is in reference to your letter of 29 October 1963 concerning eavesdropping with a concealed microphone.

"I have heard the term 'detectophone,' but I do not personally know how it is similar to or different from other types of wall microphones. The main point I was making in my work of several years back was that the presence of a 'dead' air space between walls might hinder the transmission of sound to a microphone located on the side opposite to the source of sound. It is impossible to say that this would always prohibit any sound transmission. Nevertheless, the 'cushioning' of an air pocket would be largely negated if common studding were used. If a situation did exist where a spiked microphone was ineffective, it is very likely that any other type microphone would be equally ineffective.

"I trust this answers your question. If there is any other way I may help you, please do not hesitate to write.

"Very truly yours,

"/s/ Richard F. Schwartz
"Associate Professor of
"Electrical Engineering"

RFS:sbb

From what Dr. Schwartz states, a "spike mike" would not be prohibited from picking up sounds through a common wall if in fact it was not driven in a common studding.

Counsel for petitioner on page 10 of his brief attempts to distinguish between the detectophone used in the *Goldman* case, *supra,* and the "spike mike" used in the *Silverman* case, *supra,* by stating that the former merely amplifies while the latter intrudes electrically. There is nothing in the record from which the Court could draw this conclusion. Dr. Schwartz' letter implies that the detectophone and the "spike mike" are both types of wall microphones.

The Oxford Universal Dictionary, Third Edition, defines the term "microphone" to be:

> "An instrument by which small sounds can be intensified."

The term "detectophone" is not found in that work. Had these instruments possessed different properties, it is rather strange that Dr. Schwartz would not have been aware of them, especially when the work *"The Eavesdroppers,"* Cash, Knowlton and Schwartz, covered not only the scientific aspects of eavesdropping but also the legal aspects thereof. In fact, the *Goldman* case is cited and described therein.

Counsel for the petitioner cites the dissenting opinion in the *On Lee* case (342 U. S. 747) in which Mr. Justice Burton equates the seizing of tangible effects with the "picking up" of words, implying that the electronic instrument actually penetrates the premises and *there* picks up the words. We do not believe that this is the situation at all. When words are spoken, they produce sound waves in the atmosphere. These waves when detected by the human ear are translated so as to be understood by the listener. The sound waves come to the ear—the ear does not go to the original spot from which the waves emanate. The microphone is more sensitive than the human ear.

All the microphone does is to amplify the sounds already in the atmosphere to such an extent that the same may be detected by the human ear. Words are picked up *at the* location of the microphone. We do not believe that a line can be drawn between the magnifying instruments and other such electronic devices, to which counsel for the petitioner refers, from a legal standpoint. The distinction is too fine.

We submit that this Honorable Court should reaffirm its position that in order to constitute an unreasonable search under the Fourth Amendment, there must be a showing that there was an unauthorized physical penetration into the premises of the accused.

II.

There Was No Unreasonable Search, Electronically or Otherwise

If there were an actual physical penetration into petitioner's apartment accomplished by means of the so-called "spike mike" (as contended by counsel for petitioner and denied by us) would this constitute an unreasonable search within the meaning of the Fourth Amendment?

The Supreme Court of Appeals of Virginia considered the pertinent provisions of the Virginia Constitution as well as the provisions of the Fourth Amendment in rendering its opinion in this case.

Section 10 of the Virginia Constitution is as follows:

> "That general warrants, whereby an officer or messenger may be commanded to search suspected places without evidence of a fact committed, or to seize any person or persons not named, or whose offense is not particularly described and supported by evidence, are grievious and oppressive, and ought not to be granted."

The Fourth Amendment to the Constitution of the United States is as follows:

> "The right of the people to be secured in their persons, houses, papers and effects against *unreasonable* searches and seizures, shall not be violated, and no warrants shall issue, but upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized." (Italics supplied)

As the privacy of an individual and the sanctity of his home is one of the fundamental bulwarks upon which this Republic was founded, we find that the courts have literally decided hundreds and hundreds of cases involving this subject. It has long been recognized by this Honorable Court that reasonable searches and seizures are permitted.

In *United States* v. *Rabinowitz*, 339 U. S. 56-86, the Court stated:

> "It is unreasonable searches that are prohibited by the Fourth Amendment. Carroll v. United States, 267 US 132, 147, 69 L ed 543, 548, 45 S Ct 280, 39 ALR 790. It was recognized by the framers of the Constitution that there were reasonable searches for which no warrant was required."

Likewise, consider Searches and Seizures and Immunities, Varon Volume 1, page 113:

> "In the Carroll case, *supra* [Carroll v. United States, 267 U.S. 132, 69 L. Ed. 543, page 555] the court, in considering the general reputation of an accused as an element in determining probable cause, said:

> " 'They knew, or had convincing evidence to make them believe, that the Carroll boys, as they called them, were so-called "bootleggers" in Grand Rapids,—i.e., that they were engaged in plying the unlawful trade of selling such liquor in that city.' "

How then may probable cause be determined?

In the recent case of *Draper* v. *United States,* (1958) 358 U. S. 307, 3 L. Ed. (2d) 327, the Court set forth the criteria which governs the determination of probable cause. We quote from the opinion:

> " 'In dealing with probable cause, . . . as the very name implies, we deal with probabilities. These are not technical; they are the factual and practical considerations of everyday life on which reasonable and prudent men, not legal technicians, act.' Brinegar v. United States, supra (338 US at 175). Probable cause exists where 'the facts and circumstances within [the arresting officers'] knowledge and of which they had reasonably trustworthy information [are] sufficient in themselves to warrant a man of reasonable caution in the belief that' an offense has been or is being committed. Carroll v. United States, 267 US 132, 162, 69 L ed 543, 555, 45 S Ct 280, 39 ALR 790."

In the recent case of *Ker* v. *California,* 374 U. S. 23, 83 S. Ct. 1623, June, 1963, the police officers made a search without a search warrant. The question to be determined was whether the evidence obtained by virtue of the search should be excluded. The Court held that the search must be incident to be a lawful arrest and the lawfulness must be based upon probable cause. The Court stated (83 S. Ct. 163, 10 L. Ed. (2d) 726, 739):

"The evidence at issue, in order to be admissible, must be the product of a search incident to a lawful arrest, since the officers had no search warrant. The lawfulness of the arrest without warrant, in turn, must be based upon probable cause, which exists 'where "the facts and circumstances within their [the officers'] knowledge and of which they had reasonably trustworthy information [are] sufficient in themselves to warrant a man of reasonable caution in the belief that" an offense has been or is being committed.' Brinegar v. United States, 338 U.S. 160, 175, 176, 93 L. ed 1879, 1890, 69 S. Ct. 1302 (1949), quoting from Carroll v. United States, 267 U.S. 132, 162, 69 L. ed 543, 555, 45 S. Ct. 280, 39 ALR 790 (1925); . . . ."

A search without a warrant is lawful. Again referring to the separate opinion in the *Ker* case (10 L. Ed. 726, 742), 83 Sup. Ct. 1631, 1634, we find this statement:

"The doctrine that a search without warrant may be lawfully conducted if incident to a lawful arrest has long been recognized as consistent with the Fourth Amendment's protection against unreasonable searches and seizures. See Marron v. United States, 275 U.S. 192, 72 L ed 231, 48 S. Ct. 74 (1927); Harris v. United States, 331 U.S. 145, 91 L ed 1399, 67 S. Ct. 1098 (1947); Abel v. United States, 362 U.S. 217, 4 L ed 2d 668, 80 S. Ct. 683 (1960); Kaplan, Search and Seizure: A No-Man's Land in the Criminal Law, 49 Cal. L Rev. 474, 490-493 (1961). The cases have imposed no requirement that the arrest be under authority of an arrest warrant, but only that it be lawful. See Marron v. United States, supra (275 U.S. at 198, 199); United States v. Rabinowitz, supra (339 U.S. at 61); cf. Agnello v. United States, 269 U.S. 20, 30, 31, 70 L ed 145, 148, 46 S. Ct. 4, 51 ALR 409 (1925)."

This Court has held in cases involving constitutional rights that an independent examination of the record will be made so the Court can determine for itself whether the Constitution has been violated. *Ker* v. *California, supra.* We have heretofore in this brief quoted at length from the record and summarized the evidence in connection with the circumstances leading up to the arrest of the petitioner and the entry of the police officers into her apartment where they arrested a man and a woman preparing for sexual intercourse.

Let us now examine the evidence in detail, narrating the facts and circumstances known by the police officers which justified them in having probable cause to believe that the petitioner was committing a crime immediately before and during the time the search was made. The evidence shows that petitioner had operated houses of ill-fame in Norfolk and also in Richmond. See, the testimony of Katherine Taylor (R. 10, 11, 18); testimony of Helen Buckridge (R. 23) and that of S. M. Edwards (R. 43). Both Taylor and Buckridge had heard petitioner say that she wanted to make money in order to pay a $1,000 fine. The Supreme Court of Appeals of Virginia drew the following conclusion from the testimony of Helen Buckridge and Katherine Taylor (R. 44):

> "The testimony of Helen Buckridge and Katherine Taylor clearly established that the defendant had formerly operated such an illicit business."

It would be quite naive to say that the Norfolk police authorities did not know of petitioner's activities in the field of prostitution when they directed Officer Beach to make a surveillance of her apartment.

Officer Beach knew that the petitioner had rented this apartment in an assumed name. He had been directed by the Norfolk police authorities to keep a surveillance on the apartment. (R. 28). During the first day of the surveillance, October 21, 1961, accomplished from a car parked in the street, he observed the petitioner in the apartment and saw her leave it. Between 11 a.m. and 3 p.m. he observed Katherine Taylor and Betty Johnson going in and out of the apartment. He also observed during the same period two white men enter and emerge from the apartment. (Record 29, 31). These men were there at different times. Petitioner's husband also entered and emerged from the apartment several times during the day. At 3:40 p.m. the petitioner left the apartment.

By that time (before using the spike mike), Officer Beach had just reason to believe that a crime had been committed by the petitioner. What crime? The violation of Section 18.1-205 of the Code of Virginia (1950), as amended, in that the petitioner who had rented the apartment under an assumed name had placed a female therein for the purpose of prostitution. Probable cause warranting arrest and seizure exists where the facts and circumstances within the arresting officers' knowledge and which they had reasonable trustworthy information are sufficient in themselves to warrant a man of reasonable caution in the belief that an offense has been committed or is being committed. *Draper* v. *United States, supra, Ker* v. *California, supra.* Hence, Officer Beach, had he elected to do so, could have entered the apartment at one P.M., October 23, seeking to arrest the petitioner and to make a search thereof without the necessity of a search warrant. Having the right to enter the apartment and make the arrest, it would logically follow that he had the right to

make an actual intrusion by electronic means or otherwise to obtain evidence (of course, we deny any intrusion, actual or otherwise, was made) and this would not have been an unreasonable search within the meaning of the Fourth Amendment as this Court has construed it. Comparing the case at bar with the *Ker* case, *supra*, we submit that Officer Beach before he used the so-called spike mike had sufficient knowledge of the maintenance of a house of prostitution by the defendant to justify making an entry and search in the defendant's apartment as did the police officer in the *Ker* case, *supra*, when he used the pass key and entered Ker's apartment. Again, comparing the facts and circumstances in the case at bar with those of the *Draper* case, *supra*, we submit there were facts and circumstances here sufficient in themselves to warrant a man of reasonable caution in the belief that an offense was being committed by the petitioner when the alleged intrusion or search by electronic means was effected.

If ever there was a case where the police officers knew and had just cause to believe that an offense was being committed or had been committed giving rise to probable cause, it is this case.

The law of Virginia is clear on the subject of the authority to make an arrest without a warrant. After reporting many authorities in the case of *Byrd* v. *Commonwealth*, 158 Va. 897, 900, the Court stated (p. 902):

> "From this it appears that an arrest without a warrant is lawful, (1) where a felony has been committed, (2) where it is being committed, (3) when it is about to be committed, (4) when a misdemeanor is committed in the presence of an officer, and (5) where a breach of the peace is imminent."

Considering all the facts and circumstances of the case, certainly the officers were justified in making the arrest of the petitioner on October 25, 1961, and as an incident thereto had the authority to enter her apartment and observe what was transpiring there.

Having the right to make a search of the petitioner's apartment, the police officers could make the alleged search by means of a spike mike. The evidence thereby obtained could be properly admitted in a criminal prosecution.

III.

Petitioner Using Her Apartment For An Illegal Purpose Not Entitled To Protection Under The Fourth Amendment

As important as the right of privacy is, is it not subordinate to the rights of society? Has not society the right and duty to protect itself from wrongdoers? So long as a person obeys the law of the land, he is entitled to his privacy and is entitled to protection of the Fourth Amendment. However, he waives this protection if he engages in illegal activities.

This proposition is aptly stated by the Circuit Court of Appeals in the case of *United States* v. *Goldman, supra*:

> "Conspirators who discuss their unlawful schemes must take the risk of being overheard and the risk of having what is overheard used against them provided there is otherwise no trespass by the listener . . ." (118 F. (2d) 310)

In the case of *Lanz* v. *New York,* 370 U. S. 129, 8 L. Ed. (2d) 384, this Court expressed the view that "without attempting either to find or protect the ultimate scope of the Fourth Amendment's protection, it is obvious that a jail shares none of the attributes of the privacy of a house, an automobile, an office or a hotel room."

By the same token, an apartment not occupied as a home or dwelling place but rented for the sole purpose of maintaining a house of prostitution shares none of the attributes of privacy which fall within the scope of protection afforded by the Fourth Amendment. In this connection, it should be borne in mind that the petitioner did not use this apartment as a home. She resided on Onley Road, Norfolk, Virginia (R. 12), and later on on Sewell's Point Road (R. 14).

Why should the government or a State pamper a law violator under the guise of a constitutional right? Surely, the founding fathers or anyone else never contemplated that the Fourth Amendment was to be used for the purpose of harboring criminals, e.g., those individuals who deliberately flaunt the dictates of society.

IV.

Evidence Obtained By Use Of Electronic Means Should Not Be Excluded In A Criminal Prosecution

The question of whether the use of electronic equipment should be proscribed was before the Court in the *Lopez* case, *supra*. The Court there permitted the statements of Lopez made to a police officer in Lopez' office which were recorded on a tiny recording device admitted into evidence. The Chief Justice stated in a concurring opinion:

> "I do not believe . . . all uses of such devices should be proscribed either as unconstitutional or as unfair law enforcement methods."

Society should not be deprived of the use of modern scientific means to protect itself against those who elect to disobey its laws. We submit that it is reasonable and

proper that evidence obtained through the use of electronic equipment should not be excluded in criminal prosecutions.

V.

The Evidence Sought To Be Excluded Did Not Contribute To The Conviction

The evidence, consisting of conversations of petitioner with others in the apartment which were overheard by Officer Beach did not contribute to the conviction of petitioner. Since this case reached this Court, the case of *Fahy* v. *Connecticut* has been decided (December 2, 1963). In that case, the Connecticut Supreme Court, 149 Conn. 577, 183 Atl. (2d) 256, has affirmed a conviction notwithstanding that a portion of the evidence should have been excluded, the same having been illegally secured. This was in accordance with the ruling in *Mapp* v. *Ohio,* 367 U.S. 643. In other words, the Connecticut Court held that it was harmless error to admit such evidence. Of course, the case at bar differs from the *Mapp* and *Fahy* cases as the Virginia Supreme Court did not determine that the evidence was illegally secured. This Court in the *Fahy* case decided to review the facts and determine for itself that such evidence might have contributed to the conviction. It so held, because the conviction of *Fahy* was brought about by confronting him with the black paint and paint brush which were the fruit of the illegal search. This Court in the case of *Stoner* v. *California,* 32 U.S. Law Week 4227, decided March 23, 1964, after ruling that the search of the hotel room of the accused (he being arrested four days later many miles away) was illegal and, therefore, the evidence acquired therefrom was inadmissible, ordered that the case be retried. The Court reasoned that the articles seized in the search were essential evidence to identify

the accused and, therefore, there was a reasonable possibility that the improper evidence contributed to the conviction. The case at bar is entirely different from the *Fahy* case and the *Stoner* case, both factually and otherwise.

AS HERETOFORE STATED, WE FEEL THAT THERE WAS NO VIOLATION OF THE FOURTH AMENDMENT AND THE TESTIMONY OF OFFICER BEACH RELATING TO THE CONVERSATIONS HE HEARD WAS PROPERLY ADMITTED INTO EVIDENCE. HOWEVER, WE BELIEVE THAT THE PHASE OF THE CASE DEALING WITH THE SUFFICIENCY OF THE EVIDENCE SHOULD BE ARGUED.

Let us consider in detail the charges upon which the petitioner was tried and convicted.

(a) The first count of the indictment is as follows:

> The Grand Jurors of the Commonwealth of Virginia in and for the body of the City of Norfolk and now attending the said Court, at its December term, 1961, upon their oaths, present that Catherine Clinton, alias Katherine Clinton to-wit on the 25th day of October in the year 1961, and other days within two weeks next prior thereto, in the said City of Norfolk feloniously did knowingly receive money from the earning of one Katherine R. Taylor, a female, then and there engaged in prostitution, the said money so received as aforesaid not being for a consideration deemed good or valuable in law, in violation of Title 18.1-208 of the Code of Virginia of 1950, as amended, in (fol. 4) such cases made and provided, against the peace and dignity of the Commonwealth of Virginia (R. 3).

There is not one word concerning the apartment, that is the house of prostitution, mentioned in this count. The evidence which petitioner seeks to have this Court rule as illegally obtained and, therefore, inadmissible consists of conversations and noises overheard by Officer Beach allegedly through the means of the microphone. We have placed a resume of the same in the appendix of this Brief. An examination of this will not disclose that Katherine R. Taylor was mentioned nor was she in the apartment when any of this conversation took place. Furthermore, there is not a single word in the conversation that indicates that petitioner had received any money from the earnings of Katherine R. Taylor nor from any other person engaged in prostitution. This count in the indictment was proven by the testimony of Katherine R. Taylor herself (R. 9 through 21 inclusive), who appeared as a witness for the Commonwealth and by the testimony of Helen Buckridge. Both of these witnesses stated that the charge for paid dates, that is for sexual intercourse, was ten dollars ($10) of this amount five dollars ($5) was paid petitioner. Katherine R. Taylor stated that she had participated in such activities seven or eight times (R. 14). Helen Buckridge was introduced to the petitioner by Katherine R. Taylor and the three talked over arrangements (R. 23). She was at the apartment between 5:00 P.M. and 10:00 P.M. on two or three occasions, but only filled one paid date (R. 24).

In the opinion of the Supreme Court of Appeals of Virginia, the Court took cognizance of the fact that "the jury found the defendant guilty as charged under the first count and fixed her punishment at five years imprisonment and a fine of five hundred dollars ($500)" (R. 40, 41). It will be noted that this punishment does not exceed the punishment prescribed in Section 18.1-208 of the Code of

Virginia of 1950, as amended, which is the term of imprisonment of not less than one year nor more than ten years and a fine of not more than five hundred dollars ($500).

It has been held by this Court that when a general verdict is rendered on all counts of the indictment that such verdict should stand if anyone of the counts is good. In the case of *Evans* v. *United States,* 153 U. S. 608, 38 L. ed. 839, 14 Sup. Ct. Rep. 939, the Court had this to say:

> "As the verdict of guilty was rendered upon all counts, and the sentence did not exceed that which might properly have been imposed upon conviction under any single count, such sentence is good if any such count is found to be sufficient."

Likewise, the Court followed the same ruling in the case of *Abrams* v. *United States,* 250 U.S. 616. We quote from the Court's opinion:

> "A question of law is thus presented, which calls for an examination of the record, not for the purpose of weighing conflicting testimony, but only to determine whether there was some evidence, competent and substantial, before the jury, fairly tending to sustain the verdict. Troxell v. Delaware, L. & W. R. Co. 227 U.S. 434, 442, 57 L. ed. 586, 590, 33 Sup. Ct. Rep. 274; Lancaster v. Collins, 115 U.S. 222, 225, 29 L. ed. 373, 374, 6 Sup. Ct. Rep. 33; Chicago & N.W.R. Co. v. Ohle, 117 U.S. 123, 129, 29 L. ed. 837, 839, 6 Sup. Ct. Rep. 632. We shall not need to consider the sufficiency, under the rule just stated, of the evidence introduced as to all of the counts of the indictment, for, since the sentence imposed did not exceed that which might lawfully have been imposed under any single count, the judgment upon the verdict of the jury must be affirmed if the evidence is sufficient to sustain any one of the counts. Evans v. United States,

153 U.S. 608, 38 L. ed. 839, 14 Sup. Ct. Rep. 939; Claassen v. United States, 142 U.S. 140, 35 L. ed. 966, 12 Sup. Ct. Rep. 169; Debs v. United States, 249 U.S. 211, 216, ante, 566, 569, 39 Sup. Ct. Rep. 252." (250 U. S. 619, 63 L. ed. 1176)

The Supreme Court of California recently had occasion to rule in a likewise situation. In the case of *People* v. *Tarantino*, 290 P. (2d) 505 (Cal.), evidence was obtained by the use of a microphone hidden in the defendant's office by the police. The Court had ruled shortly before in *People* v. *Cahan*, 44 Cal. (2d) 434, 282 P. (2d) 905 (1955), that such evidence could not be used. The prosecution contended that the admission of the evidence did not result in a miscarriage of justice, there being sufficient evidence independent of that obtained through the means of the mircrophone. In passing on this point, the Court stated:

> "As to Count 2 it appears to us that the evidence, entirely independent of that illegally obtained, convincingly, if not overwhelmingly, establishes guilt, and, for the reasons hereinafter more particularly stated, we conclude that the verdict on this count should not be disturbed."

We urge the Court to apply the same principle as it did in the *Evans* and *Abrams* cases, *supra*. If this is done, the result is inescapable that the judgment of the Virginia Supreme Court of Appeals, in affirming the conviction, was correct as there can be no doubt that the guilt of the accused was established by competent evidence. Furthermore, there is no necessity to consider any other phase of this case.

(b) The second count of the indictment is found on Page 3 of the Record.

This count charged the petitioner with the violation of Section 18.1-205 of the Code of Virginia in that she placed Katherine R. Taylor in a house of prostitution. It will be noted that the penalty under this section (18.1-205) is a fine of not less than one thousand dollars ($1000) and imprisonment for not less than one year nor more than ten years. The punishment fixed by the jury is well within the limits prescribed by said statute. In fact, the fine of five hundred dollars ($500) assessed was less than the fine prescribed in Section 18.1-205. The Supreme Court of Appeals stated in its opinion that the jury found the defendant guilty as charged under the first count (R. 40 and 41). Be that as it may, we are convinced that the evidence was sufficient to establish the guilt of the defendant under the second count.

If the Court will examine the testimony of Officer Beach (R. 28 through 40 inclusive), with the exception of the evidence sought to be excluded (set forth in the Appendix), the testimony of Porter (R. 7 and 8), of Edwards (R. 9, 42 and 43), of Katherine R. Taylor (R. 9 through 21 inclusive) and of Helen Buckridge (R. 22 through 28 inclusive), it will see that the evidence convincingly and overwhelmingly establishes the guilt of the petitioner on the second count. If the Court will follow its former rulings, that is, determine whether there was some evidence competent and substantial before the jury fairly tending to sustain the verdict (*Abrams* v. *United States, supra*) then it will necessarily sustain the verdict in the case at bar. All of this evidence above referred to was competent and substantial, in fact, it was overwhelming.

We submit that there is no reasonable possibility that by excluding the alleged improper evidence (conversations overheard) would have changed the jury's verdict on either count of the indictment.

CONCLUSION

For the foregoing reasons, it is submitted that the judgment entered by the Supreme Court of Appeals in this case should be affirmed.

Respectfully submitted,

ROBERT Y. BUTTON
Attorney General of Virginia

D. GARDINER TYLER
Assistant Attorney General

Supreme Court-State Library Building
Richmond 19, Virginia

CERTIFICATE OF SERVICE

I hereby certify that I have forwarded a copy of the foregoing Brief to Calvin H. Childress, Esq., 342 Law Building, Norfolk 10, Virginia, Counsel of Record for the petitioner, by depositing the same in a United States post office mail box, with first class postage prepaid, addressed to said Counsel of Record for the petitioner, at his post office address hereinabove set forth, on this 3rd day of April, 1964.

D. GARDINER TYLER
Assistant Attorney General

APPENDIX

BLANK
PAGE

Code of Virginia (1950), as amended:

"§18.1-205.—Any person who shall place any female in the charge or custody of any other person or persons for immoral purposes, or in a house of prostitution, with the intent that she shall live a life of prostitution, or any person who shall compel any female to reside with him, or with any other person for immoral purposes, or for the purposes of prostitution, or compel her to live a life of prostitution, shall be guilty of pandering, and shall be punished by a fine of not less than one thousand dollars and by confinement in the penitentiary for not less than one year nor more than ten years."

"§18.1-208.—Any person who shall knowingly receive any money or other valuable thing from the earnings of any female engaged in prostitution, except for a consideration deemed good and valuable in law, shall be guilty of pandering, and on conviction be confined in the penitentiary not less than one year nor more than ten years, and fined not more than five hundred dollars."

RESUME OF CONVERSATIONS HEARD BY OFFICER BEACH WHILE MAKING SURVEILLANCE OF THE PETITIONER'S APARTMENT

October 21, 1961

The surveillance commenced on October 21, 1961. It was made on that date some distance from the petitioner's apartment from a car in the street and therefore there were no conversations heard.

October 23, 1961

At 1:00 P.M. the phone rang and a woman stated that she had gone to the store. At 1:20 P.M. the phone rang and a woman answered it. She had hung up,

she turned around and told another woman in the apartment that a man in a green and white station * * * interrupted by counsel (R. 31). At 1:30 P.M. the woman answered the phone and hung up. She told the other woman * * * interrupted by counsel (R. 32). At 3:05 P.M. Catherine Clinton arrived at the apartment, she answered the phone (3:18 P.M.) and told the party on the other end, she said, "No, Honey. We had one and he was Shore Patrol." At 3:30 P.M. the phone rang and Catherine Clinton answered it and told the party on the other end "Make it as early as possible as she has to go home." At 4:25 P.M. a white man came in the apartment. He asked for a girl to come to his apartment. He told the woman he was talking to that he would * * * interrupted by counsel (R. 33). This man stated that he would be in his apartment in thirty minutes and wanted a woman. Catherine Clinton said that she would send her around (R. 33).

October 24, 1961

At 1:07 P.M. I could hear shoes hit the floor and it wasn't long after that that there was a—well, there was a daybed, a sort of a sofa, in the apartment—and I could hear movements on that and I could hear the springs on the sofa squeaking. At 2:25 P.M. Catherine Clinton arrived. She was told by one of the women in the apartment, the girl said, "Bob Merritt called and I told him you would be here at 3 or 3:30 at the latest." At 2:28 Catherine Clinton answered the phone and stated to the party, "Glad you called. I was going to send you home in a cab the other night. Things are slowing down but we are managing to keep our heads above water. Things will be set up for tomorrow night." At 2:44 P.M. Catherine Clinton answered the phone and said, "You be here at 5:00 o'clock." She said, "I have something working so all of us will have work."

About five minutes after that Catherine Clinton dialed the phone and asked the party, she inquired about an apartment and how much the rent was (R. 34). At 3:27 P.M. Catherine Clinton answered the phone and she says, "I don't know a Bob Merritt." Then she paused and said, "What Mr. Cohen?". Then she paused again and she said, "You have Charlie Cohen call me and then you call back." At 3:30 P.M. Catherine Clinton, after talking to a party over the phone stated to the other woman in the apartment, "Helen called and will be over at 5:00 o'clock." At 3:40 P.M. Catherine Clinton told a white man (her husband), who had just entered that Bob Merritt had called and said, "Charlie Cohen told him to call." Harry Clinton became very excited and said, "Get to the phone and call Charlie and see if he did tell this man to call." At 3:47 P.M. Catherine Clinton used the phone and asked for Charlie Cohen. She hung up and told the people in the apartment that he was out. At 3:49 P.M. the phone rang. Catherine Clinton answered it and she said, "Where are you, Mr. Cohen?" Then she paused and then she said, "You are not Charlie Cohen." She paused again and she said, "I will have to talk to you in person." At 4:00 P.M. the phone rang, Catherine Cinton answered it and said, "Charlie, are you at the store?" She paused and said, "If you give this number out," and she paused again and then she said, "O.K., but always call me first. If he will call, I will be glad to talk to him." (R. p. 35)

October 25, 1961

At 10:45 A.M. you could hear the man and the woman up against the wall where the sofa was and everything got quiet and all you could hear were springs on the day bed squeaking.

Note: In this summary we have used the language of Officer Beach as it appeared in the testimony.

BLANK PAGE

FILE COPY

Office-Supreme Court, U.S.
FILED
APR 20 1964
JOHN F. DAVIS, CLERK

IN THE

Supreme Court of the United States

October Term, 1963

RECORD NO. 294

CATHERINE CLINTON,

Petitioner,

v.

COMMONWEALTH OF VIRGINIA,

Respondent.

SUPPLEMENTAL BRIEF ON BEHALF OF RESPONDENT

ROBERT Y. BUTTON
Attorney General

D. GARDINER TYLER
Assistant Attorney General

Supreme Court-State Library Building
Richmond 19, Virginia

BLANK

PAGE

IN THE

Supreme Court of the United States

October Term, 1963

RECORD NO. 294

CATHERINE CLINTON,

Petitioner,

v.

COMMONWEALTH OF VIRGINIA,

Respondent.

SUPPLEMENTAL BRIEF ON BEHALF OF THE COMMONWEALTH OF VIRGINIA

Pursuant to the provisions of Section 5, Rule 41, of this Court, we file this supplemental brief.

On April 3, 1964, the date on which we sent our brief in chief to the Clerk of this Court, we received the following letter from the United States District Attorney for the Eastern District of Virginia, to-wit:

April 2, 1964

Mr. D. Gardner Tyler
Assistant Attorney General
1101 E. Broad Street
Richmond, Virginia

Re: Catherine Harms, a/k/a Catherine Clinton

Dear Mr. Gardner:

I have been advised by our Norfolk office that Catherine Harms, a/k/a Catherine Clinton came on for trial on November 6, 1958, and was found guilty by a jury and sentenced on July 20, 1959—joint sentence on 2nd, 3rd and 5th counts, fined $1,000.00, to stand committed for non-payment and committed to custody of the Attorney General for a term of 30 months. A Notice of Appeal was filed the same day. The Court of Appeals affirmed the decision on November 20, 1959. Writ of Certiorari denied by the Supreme Court on February 23, 1960.

I trust that the above information is helpful. If I can be of any further service, please advise.

Sincerely yours,

C. Vernon Spratley, Jr.
United States Attorney

/s/ Samuel W. Phillips
Assistant United States Attorney

Therefore, we wish to supplement our argument in reference to the reputation of the petitioner, being an element in determining probable cause. The Norfolk police authorities

undoubtedly had knowledge of her reputation. This phase of our argument is covered in our brief in chief on pages 19 to 25. When the police authorities directed surveillance of petitioner's apartment, we can assume that they were familiar with the past activities of the petitioner; that she had operated houses of prostitution in Norfolk, Virginia, and had been convicted in the United States District Court for the Eastern District of Virginia for the violation of the statute commonly known as the "White Slave Traffic Act" (18 U. S. C., Section 2422) in July, 1959, when she received a term of thirty months and was fined $1,000.00. It was to this fine which witnesses Catherine Taylor and Helen Buckridge referred in their testimony. (R. 13, 19, 23). The petitioner was formerly Catherine Harms (R. 27). It was under that name (Catherine Louise Harms) she was convicted in the Federal Court. In that case, after the United States Court of Appeals for the Fourth Circuit affirmed her conviction (272 F. (2d) 478), she sought an appeal to the Honorable Court which was denied on February 23, 1960. The following is contained in the reports of this Court pertaining to said case:

> No. 602. Catherine Louise Harms, Petitioner, v. United States. 361 U. S. 961, 4 L ed 2d 543, 80 S Ct 590.
>
> February 23, 1960. Petition for Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit, denied.
>
> Same case below, 272 F (2d) 478. Robert G. Doumar for petitioner.
>
> Solicitor General Rankin, Assistant Attorney General Malcolm R. Wilkey, and Beatrice Rosenberg, for the United States.

It is proper that this Court take judicial knowledge of its own records. It is well settled that an appellate court will take judicial notice of its own records. *Dimmick* v. *Tompkins,* 194 U. S. 540, 24 S. Ct. 780, 48 L. Ed. 1110; *Bienville Water Supply Co.* v. *Mobile,* 186 U. S. 212, 22 S. Ct. 820, 46 L. Ed. 1132; *Gauss* v. *Com.,* 141 Va. 440, 126 S.E. 1; *Fletcher* v. *Norfolk Newspapers,* (Va.), 239 F. (2d) 169.

The reputation of an accused may be considered as an element in determining probable cause *(Carrol* v. *United States,* 267 U. S. 132).

As the public records of this Court, as well as the lower federal court, showed that the petitioner had been convicted of the "White Slave Traffic Act" within a period of only twenty months from the time *certiorari* was denied by this Court, we submit that it is reasonable to assume that the police authorities of Norfolk knew of her past activities in this respect. This knowledge, coupled with the facts and circumstances gathered by the surveillance *before the use of the microphone* in the adjoining apartment would warrant a man of reasonable caution in the belief that a violation of the law of Virginia was being committed in the adjoining apartment by petitioner. We submit that this fulfills the requirement in determining probable cause. See, *Draper* v. *United States,* 358 U. S. 307, referred to in our brief on page 21.

By filing this supplemental brief, we do not desire to overemphasize this phase of our argument as we believe other phases thereof are of equal importance. There was no unlawful penetration of petitioner's premises. The evidence sought to be excluded (conversations overheard) is not necessary to establish the conviction of petitioner, there being nothing therein pertaining to the charge upon which

the petitioner was convicted, to-wit, receiving money from a prostitute.

However, we call this Court's attention to the prior conviction of the petitioner as we feel that we would be remiss in not doing so.

Respectfully submitted,

ROBERT Y. BUTTON
Attorney General

D. GARDINER TYLER
Assistant Attorney General

Supreme Court-State Library Building
Richmond 19, Virginia

CERTIFICATE OF SERVICE

I hereby certify that I have forwarded a copy of the foregoing Supplemental Brief on Behalf of Respondent to Calvin H. Childress, Esq., 342 Law Building, Norfolk 10, Virginia, Counsel of Record for the petitioner, by depositing the same in a United States post office mail box, with first class postage prepaid, addressed to said Counsel of Record for the petitioner, at his post office address hereinabove set forth, on this 17th day of April, 1964.

D. GARDINER TYLER
Assistant Attorney General

BLANK
PAGE

SUPREME COURT OF THE UNITED STATES

No. 294.—October Term, 1963.

Catherine Clinton, Petitioner, *v.* State of Virginia.	On Writ of Certiorari to the Supreme Court of Appeals of Virginia.

[May 4, 1964.]

Per Curiam.

The motion to strike the supplemental brief on behalf of the respondent is denied. The judgment is reversed. *Silverman* v. *United States*, 365 U. S. 505; *Ker* v. *California*, 374 U. S. 23.

Mr. Justice Clark concurring: Since the Court finds that the "spiked" mike used by the police officers penetrated petitioner's premises sufficiently to be an actual trespass thereof, I join in the judgment.

Mr. Justice White dissents.